(1) 89-439

NO.

In the Supreme Court of the United States

OCTOBER TERM, 1989

DAVIS OIL COMPANY, ET AL
Petitioners

versus

WILLIAM P. MILLS, III, ET AL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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95 pp

QUESTIONS PRESENTED

1) Whether the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires that a foreclosing mortgagee in addition to constructive notice by advertising the foreclosure sale in a local newspaper, must provide actual notice to Davis Oil Company, a mineral lessee, whose publicly recorded lease will, under Louisiana law, be extinguished by the seizure and sale of the property covered and affected thereby?

2) Whether Davis Oil Company's identity, address and mineral lease interest in the property foreclosed upon was "reasonably ascertainable" from a search of the Conveyance Records of Lafayette Parish, Louisiana?

3) Whether the foreclosing creditor, the First National Bank of Lafayette, Louisiana, or the Sheriff of Lafayette Parish, Louisiana undertook "reasonably diligent efforts" to identify and provide notice to Davis Oil Company?

4) Whether the Fifth Circuit erred when it held that the enactment of Louisiana's request notice statute (La. R.S. 13:3886) provided an "alternative means of ensuring the receipt of notice" and thus is a factor to be considered in determining the reasonableness of mere constructive notice despite this Court's pronouncement in *Mennonite Board of Missions v. Adams,* 462 U.S. 791 (1983), that "a party's ability to take steps to safeguard its interest does not relieve the State of its constitutional obligation"? *Id.* at 799.

5) Whether the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution requires actual notice to a party who has a publicly recorded interest in the property subject to foreclosure?

LIST OF INTERESTED PARTIES

The following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recall:

PETITIONERS:

Davis Oil Company, a Colorado partnership composed of the following partners: Marvin Davis, the Estate of Jack Davis, the Patricia Davis Trust, the Nancy Davis Trust, the Dana Leigh Davis Trust, the Greg James Davis Trust and the John Davis Trusts.

Exxon Corporation

Saturn Energy Company, (a subsidary of The Western Company of North America)

Vale & Company, a New York limited partnership, whose general partner is Gay V. Land

Allen E. Paulson

RESPONDENTS:

William P. Mills, III

John L. Robertson

Brenda Sue Harmon Robertson

Orel Bridges, Jr.

Ethyl Sue Hoffpauir Bridges

PETITIONERS:

Kenneth D. Upton

William J. Guste, Jr., as the Attorney General of the State of Louisiana

Donald Breaux, as the Sheriff of Lafayette Parish, Louisiana

First National Bank of Lafayette, Louisiana

ATTORNEYS:

F. Henri Lapeyre, Jr.

Matthew J. Randazzo, III

E. Burt Harris

Warren D. Rush

Charles R. Minyard

Barry J. Heinen

Thomas J. Duplantier

Paul B. David

Kai David Midboe

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Petitioners, Davis Oil Company, Exxon Corporation, Vale & Company, Allen E. Paulson and Saturn Energy Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 15, 1989, rehearing en banc denied on June 14, 1989.

OPINIONS BELOW

A Judgment was entered on August 5, 1987, by the Honorable John M. Duhe, Jr., then United States District Judge [Appendix E], dismissing all claims of Davis, et al with prejudice and dismissing the various cross claims as moot for the reasons set forth in his Memorandum Ruling [Appendix D]. On November 19, 1987, Judge Duhe

rendered an Order denying Davis' Motion to Amend and Supplement Findings of Facts and Conclusions of Law and Motion for New Trial [Appendix F]. On December 15, 1987, Davis, et al filed a Notice of Appeal with the Clerk of the United States Court of Appeals for the Fifth Circuit. On May 15, 1989, the Fifth Circuit affirmed the District Court's decision at 873 F.2d 774 (5th Cir. 1989) [Appendix A] and Judgment was entered on the same day in accordance with the opinion [Appendix B]. On June 14, 1989, the Fifth Circuit denied the Suggestion for Rehearing En Banc filed by Davis, et al [Appendix C].

JURISDICTION

The United States District Court for the Western District of Louisiana had jurisdiction pursuant to 28 U.S.C. § 1343(3) and (4), 42 U.S.C. § 1983 and diversity of citizenship, 28 U.S.C. §1332. The United States Court of Appeals for the Fifth Circuit had jurisdiction of this case as an appeal from a final decision of a District Court of the United States pursuant to 28 U.S.C. §1291. The jurisdiction of this Court is evoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides in pertinent part as follows:

> Amendment XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Statutes of the United States provide as follows:

> 42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Kenneth D. Upton ("Upton") purchased a 14.63 acre tract of land located in Lafayette Parish, Louisiana ("Subject Tract"), in August of 1977. An Oil, Gas and Mineral Lease ("Subject Lease") dated November 3, 1983, rcorded November 8, 1983, under Entry No. 83-41444 of the Conveyance Records of Lafayette Parish, Louisiana, was entered into by and between Upton, as Lessor, and Louisiana Land Management, Inc., as Lessee. The Subject Lease was the only mineral lease affecting the Subject Tract in force and effect during the pertinent periods relevant to this litigation. Louisiana Land Management, Inc. assigned the Subject Lease unto Davis Oil Company ("Davis") on January 30, 1984, by instrument recorded Januaray 30, 1984, under Entry No. 84-3462 of the Records of Lafayette Parish, Louisiana. By virtue of an Act of

Collateral Mortgage dated May 23, 1983, Upton mortgaged, affected and hypothecated certain properties, including the Subject Tract. Upton pledged and delivered unto the First National Bank of Lafayette, Louisiana ("FNB") a Collateral Mortgage Note secured by the aforesaid Collateral Mortgage.

Suit styled "First National Bank of Lafayette v. American Rental Tools, Inc. and Kenneth D. Upton", No. 84-2157 of the docket of the Fifteenth Judicial District Court, Lafayette Parish, Louisiana, was filed on April 12, 1984. Upton, pursuant to an agreement with FNB to avoid a deficiency judgment, answered FNB's Petition on the same day by (i) admitting all allegations of fact, (ii) confessing judgment in favor of FNB for the full sum sought by FNB, (iii) waiving all legal delays and his right to be present at the trial thereof, (iv) submitting the matter to the court on the evidence submitted by FNB, (v) praying that judgment be rendered in favor of FNB in accordance with the law and that the judgment be made executory immediately without the necessity of further delay and (vi) waiving all delays provided by the Louisiana Code of Civil Procedure relating to suspensive appeals. Also, on the same day, April 12, 1984, a money judgment was rendered by the Honorable B. J. Gautreaux, District Judge, in favor of FNB and against Upton and American Rental Tools, Inc., *in solido.*

In execution of its judgment, FNB obtained a writ of fieri facias, ordering Donald Breaux the Lafayette Parish Sheriff ("Sheriff") to seize property belonging to Upton. FNB targeted certain properties, including the Subject Tract, for seizure and judicial sale. The Clerk of Court provided the Sheriff with a Mortgage Certificate (a/k/a a Certificate of Non-Mortgage) showing all encumbrances on the Subject Tract. Neither the Sheriff nor FNB: (i) examined

the Conveyance Records; (ii) caused same to be examined; or (iii) requested the Clerk of Court for Lafayette Parish to provide a Conveyance Certificate (a/k/a a Certificate of Non-Alienation) to determine if Upton had sold, leased or otherwise alienated any of his property rights in and to the Subject Tract prior to the judicial sale. The scheduled judicial sale was advertised in the *Daily Advertiser,* a local Lafayette, Louisiana newspaper. On May 30, 1984, the Sheriff purportedly sold the Subject Tract to FNB ("Sheriff's Sale"). Davis did not receive notice of the Sheriff's Sale.

An Act of Sale dated February 12, 1985, was entered into by FNB in which FNB purportedly conveyed unto William P. Mills, III, John L. Robertson, Brenda Sue Harmon Robertson, Orel Bridges, Jr. and Ethyl Sue Hoffpauir Bridges ("Mills, et al") the Subject Tract, subject to all prior oil and gas leases burdening the Subject Tract of record.

On July 1, 1985, Davis and its assigns or their successors, i.e., Exxon Corporation, Saturn Energy Company, Vale & Company and Allen E. Paulson ("Davis, et al"), filed suit in the United States District Court for the Western District of Louisiana. Various cross claims involving indemnity questions were initiated among the defendants. Additionally, Mills counterclaimed and filed a separate damage suit against Davis, et al, which was initially consolidated with the suit filed by Davis, et al and has since been segregated. The matter was submitted on stipulations, depositions, documentary evidence and trial memoranda.

REASONS FOR GRANTING A WRIT OF CERTIORARI

Due to the economic turmoil which has gripped the

oil producing states, including Louisiana, an unusually high rate of foreclosure proceedings are taking place. This case exemplifies why such proceedings must be conducted with fairness and in compliance with due process. Davis' valuable mineral lease was here terminated without an opportunity to either appear in the foreclosure proceedings to protect its interests or to bid at the foreclosure sale to avoid its loss, all because the Louisiana law governing foreclosure proceedings does not require that direct notice be given to it. This failure of Louisiana law should not be countenanced when the opportunity for further injustices is multiplied by the economic realities of the times. The effect of the ruling of the United States Court of Appeals for the Fifth Circuit in this case would be to classify owners of valuable mineral leases as parties who are not entitled to the protection of the Due Process Clause simply because of "the nature of the property interest at stake." 873 F.2d at 779, n. 9 [Appendix A]. The Fifth Circuit has turned the Due Process Clause on its head and ruled that the foreclosing creditor must itself have actual notice of the existence of a mineral lease burdening the property sought to be sold at foreclosure sale [and not just the constructive notice which results from the recordation of such mineral leases in the Conveyance Records of the parish where the property is situated] before such foreclosing creditor would be required, in turn, to give actual notice of the foreclosure proceedings to the owner of such mineral lease. 873 F.2d at 787, n. 20 [Appendix A]. The Fifth Circuit has placed the burden of discharging the State's Due Process obligation upon the party whose rights are being terminated and not upon the party who uses the State's instrumentalities and offices to cause such termination. 873 F.2d at 790, n. 25 [Appendix A]. By this ruling the Fifth Circuit has eviscerated the protections afforded by the Constitution to owners of mineral leases and, if such ruling is allowed to stand unaltered by this Court, the rights of all property

owners who have recorded deeds will be diminished.

This Court has heretofore recognized that parties owning publicly recorded interests in property subject to a foreclosure proceeding are entitled to certain Due Process protections before their interests may be terminated by the foreclosure sale. The Due Process Clause of the Fourteenth Amendment to the Constitution mandates that actual notice be given to a party owning an interest in the property foreclosed if such party's interest is evidenced by the Public Records or such party's identity is otherwise reasonably ascertainable with the exercise of reasonable diligence. Davis should be entitled to actual notice before its interest in the Subject Tract (which both courts below recognized to be a legally protected property interest within the meaning of the Fourteenth Amendment of the U.S. Constitution) is terminated. The Fifth Circuit's decision in the instant matter is contrary to the jurisprudence of the United States Supreme Court, is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case of *Verba v. Ohio Casualty Ins., Co.*, 851 F.21d 811 (6th Cir. 1988), and the subsequent decision of the Fifth Circuit in *Small Engine Shop, Inc. v. Cascio*, 878 F.2d 883 (5th Cir. 1989) and deprives Davis of the protection afforded by the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. §1983 for the reasons shown *infra*.

I. *CONSTRUCTIVE NOTICE IS INSUFFICIENT*

The Fifth Circuit was in error in holding that, although Davis had a legally protected recorded property interest (see, pgs. A-27 and A-37 of the Appendix) in the Subject Tract, constructive notice was constitutionally adequate notice. Louisiana's foreclosure scheme is set forth in the Fifth Circuit's opinion in Appendix A at pages A-7 through A-10. The notice required by the Due Process

Clause is one that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Trust Company,* 339 U.S. 306, 314 (1950). Notification by classified advertisement in the *Daily Advertiser* of Lafayette Parish, Louisiana is a particularly ineffective way to alert those in jeopardy (such as Davis) of losing substantial property rights. See, *Bonner v. B-W Utilities, Inc.*, 452 F. Supp. 1295 (W. D. La. 1978). The constructive notice given in this case by publication is constitutionally deficient because the State's Due Process obligation was not reasonably and diligently discharged where FNB, the Sheriff and the State of Louisiana made absolutely *no* effort to ascertain from an examination of the Conveyance Records of Lafayette Parish, Louisiana, if *any* person other than the judgment debtor (Upton) owned *any* interest in the Subject Tract which would be terminated by the foreclosure. As noted previously, Upton acted in consort with FNB to expedite the foreclosure of the Subject Tract. This is a case where there was total disregard of the property rights of others and complete and utter lack of diligence. It is somewhat mystifying how the Fifth Circuit could rule that the total inaction of the aforesaid "state-actors" met the "reasonable diligence" standard which it espoused.

This Court in *Mullane, supra,* commented upon the inadequacy of notice by publication to members of a common trust fund, as follows;

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the

> information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint. Nor is publication here reinforced by steps likely to attract the parties' attention to the proceeding."

Mullane, 339 U.S. at 315-16. Davis' only office in Louisiana is located in New Orleans. This city is outside of the normal circulation of the *Daily Advertiser* which is published in the City of Lafayette, Louisiana. It was shown by the Affidavit of Peter U. Schlegel that in fact no employee or agent of Davis had been aware of the seizure of the Subject Tract as a consequence of the publication of the advertisement in the *Daily Advertiser*. Lastly, the advertisement of the seizure of the Subject Tract in the *Daily Advertiser* did not include the name of the party whose attention it was supposed to attract, *i. e.* Davis and therefore, "acquaintances" of Davis in the Lafayette area did not have information sufficient to consider the possibility of calling the "advertisement" to the attention of Davis. *Mullane, supra.*

Publication as a customary substitute to actual notice is not sufficient because FNB could have easily ascertained that the Subject Lease was owned by Davis and by a simple letter or telephone call could have notified Davis of the seizure of the Subject Tract and the forthcoming judicial sale.

In the case of *Mennonite Board of Missions v. Adams*, 462 U. S. 791 (1983), the appellant who held a mort-

gage on property sold at a tax sale was not notified prior to the tax sale. This Court held that prior to taking an action that will affect an interest in life, liberty or property protected by the Due Process Clause, a State must provide notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections and that notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or notice by mail. In addition, this Court held that an owner of a legally protected property interest is entitled to notice reasonably calculated to apprise him of a pending tax sale. It was further held that constructive notice to such a person who is identified in the public records does not satisfy the due process requirement of *Mullane, supra.* Finally, this Court concluded that personal service or notice by mail is required even though sophisticated creditors have means at their disposal to discover whether property taxes have not been paid and whether tax sale proceedings are therefore likely to be initiated.

In *Mennonite, supra,* until the redemption period had expired the tax sale did not even completely extinguish the claim of the protected mortgagee but, merely "diminishe[d] the value" of the mortgagee's interest. 103 S. Ct. at 2711. Yet this Court held that due process required that the mortgagee be given actual notice of the tax sale. In the recent case of *Tulsa Professional Collection Services v. Pope,* 485 U.S. 478 (1988), this Court held that a creditor with no recorded interest in the property of an estate should be given notice by mail or such other means as is certain to ensure actual notice and that constructive notice by publication was insufficient. It was further held that actual notice is not so cumbersome, burdensome or impracticable as to

warrant reliance on publication notice alone.

The decision of the Fifth Circuit is totally inconsistsent with *Mennonite* as well as the following Supreme Court cases: *Pope, supra; Memphis Light, Gas & Water Division v. Craft,* 436 U. S. 1 (1978) [termination of utility service]; *Schroeder v. City of New York,* 371 U. S. 208 (1962) [condemnation proceeding]; and *City of New York v. New York, N. H. & H. R. Co.* 344 U.S. 293 (1953) [bankruptcy code's requirement of "reasonable notice' requires actual notice of deadline of filing claims]. In all of the cited cases this Court has adamantly and consistently held that "reasonable notice" requires actual notice. In *Pope, supra* this Court has even ruled that a creditor with no public record of its claim is entitled to actual notice. How then could the Fifth Circuit rule that Davis, which has a legally protected *recorded* property interest, not be entitled to actual notice without running afoul of this Court's rulings in *Mullane, Mennonite* and *Pope, supra*?

As alluded to heretofore, the holding of the Fifth Circuit in the instant litigation is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the case of *Verba, supra.* In *Verba,* Ohio Casualty Insurance Company, a judgment creditor with a recorded judgment lien, was not given actual notice by the IRS of a tax sale of property affected by the aforesaid recorded lien. The Sixth Circuit held that the lack of actual notice to Ohio Casualty did not comport with the requirements of procedural due process under the Fifth Amendment to the U.S. Constitution. The only means undertaken in *Verba* to notify the holder of a publicly recorded judgment lien of an impending tax sale were publication and posting as provided by 26 U.S.C. §6335(b) even though the name and address of Ohio Casualty was in the Public Records of Cuyahoga County, Ohio. Relying on *Mennonite,* the Sixth Circuit held

that personal service or mailed notice is constitutionally required to be provided when the identity and address of a person or entity are a matter of public record. 851 F.2d at 816; *Mennonite,* 462 U.S. at 799. The Sixth Circuit construed *Mennonite* to require that actual notice must be given to every party who has a publicly recorded interest in the property in question. The Fifth Circuit disagrees with the Sixth Circuit's construction of the *Mennonite* requirements. See Page A-35 of the Appendix.

This Court has soundly rejected arguments that a pressing need to proceed expeditiously justifies less than actual notice. For example, while this Court has recognized that in the bankruptcy context there is a need for prompt administration of claims, it has nevertheless required that actual notice be given in bankruptcy proceedings. *Bank of Marin v. England,* 385 U.S. 99 (1966); *City of New York, supra.* Although there may be a pressing need for expediency in foreclosure proceedings, we do not believe that such proceedings are so different in kind that a different result than that required by this Court and the Sixth Circuit in probate proceedings, tax sales, trust proceedings, condemnation proceedings and termination of utility service proceedings is justified or can pass constitutional scrutiny.

Mullane, supra, and its progeny must continue to be the trusted guides to be used by the Circuit Courts. The Fifth Circuit's attempt to limit and narrow the scope of such guiding jurisprudence is unsupportable. An owner of a recorded property interest which is subject to deprivation by State action, such as Davis and Ohio Casualty in *Verba,* is entitled to means as certain as the mail to ensure actual notice if its identity and address are in the Public Records. *Mennonite, supra.* As properly stated by the court in

Verba, supra, "[o]ur inquiry is not open-ended, for the Supreme Court has articulated a standard allocating the burdens of notice in this due process context". 878 F.2d at 887.

II. *REASONABLY ASCERTAINABLE*

In *Mullane, supra* this Court recognized that prior to taking any action affecting property interests, states must provide "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objection". 339 U.S. at 314. The rule that emerged from *Mullane*, is that constructive notice is insufficient as to persons actually known to a seizing creditor or whose identity was "very easily" ascertainable. *Schroeder v. City of New York*, 371 U.S. 208 (1962). FNB was obligated to send direct notice to Davis where its name and mailing address and the fact that it would be affected by the proceedings were readily at hand in the Conveyance Records of Lafayette Parish, Louisiana.

The Fifth Circuit was in error in concluding as a matter of law that the record contained sufficient evidence which "amply supports the district court's finding that a search of the conveyance records to identify parties with mineral interests would be unduly burdensome. . ." and beyond the routine examination of Land Records envisioned by this Court in *Mennonite, supra*. See page A-32 of the Appendix. As observed by this Court, Due Process is not "a technical conception" of "inflexible procedures". *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), nor is it a "mechanical instrument" or "yardstick"; it is rather "a delicate process of adjustment" and a balancing of interests in which it is recognized "that what is unfair in one situation may be fair in another". See, Justice

Frankfurter's concurring opinion in *Anti-Facist Committee v. McGrath*, 314 U.S. 123, 162-63 (1951). Petitioners respectfully submit that in the instant matter the facts constitute a situation in which Due Process concerns tip the "balancing of interests" in favor of petitioners and, therefore, the Sheriff's Sale should not terminate Davis' interest in the Subject Tract. In the case at bar there was only one viable mineral lease affecting the Subject Tract. At the time of the Sheriff's Sale Davis was the sole owner of Subject Lease. In order to identify Davis, it would have been necessary to look at only two instruments which were properly recorded and indexed in the Conveyance Records of Lafayette Parish, Louisiana; the Subject Lease which was granted in favor of Louisiana Land Management, Inc., as Lessee, and the Assignment from Louisiana Land Management, Inc. to Davis. Davis' name *and* mailing address are given in the latter instrument.

The Subject Lease and the aforesaid Assignment were admitted into evidence. The district court had ruled that a search of the Conveyance Records for owners of interests in mineral leases may prove to be a useless or futile exercise inasmuch as the viability of a mineral lease in some cases could only be determined by information which is not in the Conveyance Records. That is to say, most mineral leases provide for termination unless rentals are paid or operations and/or production is obtained from the lands affected thereby or pooled or unitized therewith. We can agree that given the proper circumstances it may very well be an unreasonable burden to require a foreclosing creditor to determine the "viability" of a mineral lease if it is not shown to be viable as a matter of Public Record. But this is not the factual situation which confronts this Court. The Subject Lease specified a three year primary term subject to the conditions and agreements contained therein. Paragraph 1 of the Subject Lease states in perti-

nent part as follows:

> "1. This lease shall terminate on *November 3, 1984*, unless on or before said date the Lessee either (1) commences operations for the drilling of a well on the land, or on acreage pooled therewith (or with any part thereof), in search of oil, gas or other minerals and thereafter continue such operations and drilling to completion or abandonment; or (2) pays to the Lessor a rental of ONE HUNDRED AND NO/100 DOLLARS ($100.00) per acre for all or part of the land which Lessee elects to continue to hold hereunder, which payment shall maintain Lessee's rights in effect as to such land without drilling operations for one year from the date last mentioned. . . ."

By virtue of the aforesaid provision it is apparent that no rental payments need be made nor any operations conducted in order to maintain the Subject Lease through November 3, 1984; such rentals or operations only being required to be paid or conducted on November 3, 1984, some several months after the seizure and Sheriff's Sale of the Subject Tract which was covered by the Subject Lease.

Louisiana Mineral Code Article 133 (Louisiana Revised Statute 31:133) provides that "a mineral lease terminates at the expiration of the agreed term or upon the occurrence of an express resolutory condition". Clearly the Subject Lease was a viable lease on its face, and an examination outside of the Conveyance Records of Lafayette Parish, Louisiana, was not necessary to ascertain such fact.

Oddly, the Fifth Circuit attempted to avoid this issue by understating it. It found that a seizing creditor need not determine the viability of a mineral lease since what is required is that the creditor undertake reasonably

diligent efforts to identify and provide notice to parties having an interest in property and that, therefore, the proper inquiry is whether reasonable diligence requires that the seizing creditor search the Public Records for the names and addresses of persons holding mineral leases on the Subject Tract. It is obvious that one who holds an interest in a recorded mineral lease which has terminated holds no interest at all. Thus, the viability of a mineral lease is important to the inquiry since no notice need be given to a former owner of a terminated interest in the property being foreclosed upon.

The difficulty of ascertaining the viability of a mineral lease which is beyond the first year of its primary term from the Conveyance Records alone should not be used as an excuse to avoid *any* effort to determine the existence *vel non* of mineral leases such as Davis' which clearly were viable on the face of the Public Records and which could readily and easily be found from a simple search of such records.

The lower courts failed to recognize and the respondents failed to refute: (i) that the Subject Lease was within the first year of its primary term; (ii) the Subject Lease was duly recorded in the Conveyance Records of Lafayette Parish, Louisiana; (iii) the name and mailing address of Davis were contained in the Conveyance Records of Lafayette Parish, Louisiana; (iv) in accordance with the uncontradicted testimony of Ms. Joan Broussard, the existence of the Subject Lease, the current ownership of said lease and the name and address of the owner, Davis, was reasonably ascertainable from the Conveyance Records of Lafayette Parish, Louisiana, at the time of the Sheriff's Sale; (v) the viability of the Subject Lease could have been ascertained without referring to any records other than the Conveyance Records of Lafayette Parish, Louisiana; (vi)

neither the Sheriff nor FNB examined or caused to be examined the Conveyance Records of Lafayette Parish; and (vii) neither the Sheriff nor FNB attempted to ascertain if Upton had alienated any of his rights in the Subject Tract. In the instant case, there was no complex maze of leases and assignments in which FNB had to wend its way through and, therefore, the burden of requiring FNB to identify the interests of Davis in the Subject Tract was very minimal and a burden which could have been discharged with a very slight effort.

The several Conveyance Records of the respective Louisiana parishes are created and maintained for the very purpose of allowing one to determine with a minimum of effort the owners of interests in immovable (real) property. Great effort is made by the Clerks of Court who are charged with the responsibility of maintaining the Conveyance Records to properly index their records so that all instruments which affect title to immovable property may be easily and efficiently ascertained. The Conveyance Records of the several parishes are examined daily by hundreds of lay persons without any special training in law for the purposes of determining the owners of interests in immovable property situated in Louisiana. Where else would one go to determine the identity of persons purporting to hold interests in property but the Conveyance Records?

The logic of the ruling of the lower courts that the Conveyance Records need not be examined is analogous to an unreasoned refusal to ever use a phone book to attempt to determine the phone number of parties one needs or desires to telephone, simply because any such individual's surname may be replicated several times therein making it tedious to find the proper name even though the listings are alphabetized. Instead the person with such a displaced notion of the truly burdensome relies exclusively upon his

being informed by the parties he wishes to telephone of their respective phone numbers and commits them to memory. Such irrational behavior will surely prevent the ascertainment of phone numbers in the usual and commonplace manner and will more than likely result in many calls never being placed. Simply because there may be more than one conveyance affecting property does not mean that it is unduly burdensome to require that the Conveyance Records be examined to make such determination. The State's Due Process obligation cannot be so easily thwarted.

Louisiana's highest court, the Supreme Court, in the recent case of *Magee v. Amiss,* 502 So.2d 568 (La. 1987), held that:

> "One with legally protected property interests, such as Doris Magee, is entitled to notice of the property's pending sale. 'Notice by mail or other means certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party, . . . if its name and address are reasonably ascertainable'. *Mennonite Board of Missions v. Adams,* 462 U.S. 791 at 800 (1983)".

Id. at 571. The property in question in *Magee* had been acquired by Archibald Carter Magee, Sr. while married to and living with Doris Lancaster Magee from John D. and Mary B. Southerland. The Sutherland's retained a vendor's lien and the Magees assumed the balance on a $26,800 promissory note to the Capitol Building and Loan Association. The recorded deed in the Conveyance Records of East Baton Rouge Parish, Louisiana revealed that Doris Lancaster Magee's interest in the seized property originated when her husband, Archibald Carter Magee, Sr., acquired the property in a sale which recited that he was married to

and living with Doris Lancaster Magee. A sheriff's sale of the property in question occurred without notice being furnished by the Sheriff of East Baton Rouge Parish to Ms. Magee. Even though the address of Doris Lancaster Magee was not readily asscertainable in the Conveyance Records of East Baton Rouge Parish, Louisiana, the Louisiana Supreme Court held that she had a legally protected recorded property interest in the property and was entitled to at least the minimum protection recognized in *Mennonite (i.e.,* direct notice) and, as such, the purchaser at the sheriff's sale only acquired the interest of Archibald Magee, her husband, and that Doris Magee retained her undivided one-half interest in the property.

In the lower courts, Davis had asked for relief similar to that which was granted to Doris Magee. Davis requested that the Fifth Circuit hold that the Sheriff's Sale and the subsequent sale by FNB to Mills, et al of the Subject Tract were made subject to the Subject Lease since Davis was not provided the minimum required protection under *Mullane, Mennonite, supra,* and their progeny and, therefore, the Sheriff's Sale could not have terminated the interests of Davis in the Subject Tract. Furthemore, since the Louisiana Supreme Court held that Doris Magee was entitled to actual notice even when her address was not readily ascertainable in the Conveyance Records of East Baton Rouge Parish, Louisiana, then Davis, which had its address readily asscertainable in the Conveyance Records of Lafayette Parish, Louisiana, is surely entitled to actual notice and the giving of such notice to Davis would have been less of a burden upon FNB then that imposed by the Louisiana Supreme Court , in *Magee*, upon the seizing creditor and the Sheriff of East Baton Rouge Parish, Louisiana.

There was no justifiable reason for resort to means less likely than the mail to apprise Davis of the pendency

of the foreclosure proceedings especially when it was the sole owner of the only mineral lease affecting the Subject Tract. *See, Mullane, supra,* and *Schroeder, supra.* The case at bar is one in which Due Process concerns clearly tip the scales in petitioners' favor. Under this Court's cited jurisprudence (and until it is reversed) as a matter of law direct notice should have been given to Davis. Therefore, the holding of the Fifth Circuit should be reversed and vacated.

III. *REASONABLE DILIGENCE*

The Fifth Circuit misconstrued the reasonable diligence test of *Mullane* and *Mennonite, supra,* and their progeny when it decided that constructive notice was sufficient even though FNB made no effort to check the Conveyance Records prior to the Sheriff's Sale of the Subject Tract. *Mennonite's* standard expresses the relationship between the responsible state actor and the owner of a property right who is claiming the due process right. Although the diligence that is reasonable will vary from context to context, *Mennonite* informs us that reasonable diligence is expected from the state actor. *Mennonite,* 103 S.Ct. at 2711-12; *Pope,* 108 S.Ct. at 1347-48. An examination outside of the Conveyance Records of Lafayette Parish was not necessary to ascertain the existence of the Subject Lease and the name and address of its owner. Rather, FNB and the Sheriff would have only needed to conduct a routine examination of the Conveyance Records of Lafayette Parish, Louisiana, as envisioned by this Court in *Mennonite, supra.* In Louisiana, the Land Records are divided into the Mortgage Records which contain all recorded liens, mortgages and other encumbrances affecting property and the Conveyance Records which contain all alienations, conveyances and leases affecting immovable property. In the instant matter, the Clerk of Court only examined the Mortgage Records. It is undisputed that

an examination of the Conveyance Records *never* took place.

Under Louisiana's Public Records Doctrine, recordation of one's interest in the Conveyance Records is required before such interest is effective against third persons. See, Louisiana Civil Code Article 1839, Louisiana R.S. 9:2721, Louisiana Mineral Code Article 18 (La. R.S. 31:18) and *McDuffie v. Walker,* 125 La. 152, 51 So. 100 (1909). Davis did what was required under the Louisiana Public Records Doctrine by recording its interest in the Subject Tract in the Conveyance Records of the Parish where the Subject Tract is located.

Ms. Joan Broussard's deposition (which was submitted in lieu of trial testimony by agreement of all parties) established how readily the name and address of Davis could be found in the Conveyance Records of Lafayette Parish, Louisiana, the many ways a foreclosing creditor could determine with reasonable diligence the existence in the Conveyance Records of Davis' interest in the Subject Tract and to contradict the unsupported allegations of the respondents, Mills, et al and FNB, that the Conveyance Records were "ambiguous" and that a routine search would be burdensome and time consuming.

There is absolutely no evidence in the record to the effect that the existence of the Subject Lease and the ownership thereof could not be readily and easily obtained by a routine check of the Conveyance Records of Lafayette Parish, Louisiana. Indeed, the deposition of Ms. Broussard provides adequate evidence that this information was reasonably ascertainable in several ways prior to the Sheriff's Sale of the Subject Tract. The deposition of Ms. Broussard provided clear, convincing and uncontroverted evidence (which the Fifth Circuit obviously failed to fully appreciate despite the fact that no contradictory testimony

was presented by respondents) that a simple and routine examination of the Conveyance Records of Lafayette Parish, Louisiana, would have revealed in a very short time at no expense that : (i) the Subject Lease was in force and effect; (ii) Davis was the owner of the Subject Lease; (iii) the address of Davis; and, (iv) that no other mineral lease affected the property.

Mr. Paul T. Gallagher was deposed because of his role as the lead attorney representing FNB in the foreclosure proceedings. His testimony clearly established that *no effort whatsoever* was made by FNB to: (i) determine if the Subject Tract had been sold to a third party; (ii) determine if a mineral lease was granted by Upton covering the Subject Tract; (iii) request a Conveyance Certificate from the Clerk of Court of Lafayette Parish; (iv) examine or cause to be examined the Conveyance Records of Lafayette Parish, Louisiana; or (v) seek free assistance from the Clerk of Court in order to discover if a person had obtained an interest in the Subject Tract from Upton prior to the Sheriff's Sale.

The Fifth Circuit erred when it ignored the maxim established by the jurisprudence of this Court that reasonable diligence in ascertaining the identity of parties with legally protected property rights is required by the Due Process Clause of the Fourteenth Amendment regardless of the availability of means of protecting one's interest in property. *Mennonite* requires the responsible state actor to make "reasonably diligent" efforts to ascertain the identity of the person with an interest in property. 103 S.Ct. at 2711 n.4. Such efforts are mandatory and can not be excused for any reason, even knowledge of the pending foreclosure proceeding.

Davis did not know that its property interest was in

jeopardy of being extinguished by the judicial sale of the Subject Tract because of the foreclosure proceedings instituted by FNB. Davis did not know that the Subject Tract was affected by FNB's mortgage. FNB was charged under the jurisprudence of this Court and the United States District Court for the Western District of Louisiana with the obligation of determining, either from direct questioning of Upton, or by an examination of the Conveyance Records of Lafayette Parish, whether or not Upton had alienated any or all of his rights in and to the Subject Tract. *Mullane, Mennonite* and *Bonner, supra,* and the cases cited therein. An inquiry into this subject would have made FNB aware of the interest of Davis in the Subject Lease and that the Subject Lease was the only mineral lease affecting the Subject Tract.

Regarding the constitutional obligation of the Sheriff, FNB and the State of Louisiana to provide notice of a proceeding which would terminate an interest in property, this Court in *Mennonite, supra,* stated:

> "More importantly, a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation. . . . But it does not follow that the State may forego even the relatively modest administrative burden of providing notice by mail to parties who are particularly resourceful [footnote and citation omitted]. Notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable. Furthemore, a mortgagee's knowledge of delinquency in the payment of taxes is not equivalent to notice that a tax sale is pending. The latter 'was the information which

> the [County] was constitutionally obligated to give personally to the appellant - an obligation which the mailing of a single letter would have discharged.' (citation omitted)"

103 S.Ct. at 2712. FNB, the Sheriff and the State of Louisiana were not relieved of their constitutional obligation to provide Davis with actual notice either by mail or other means as certain to ensure actual notice. "We do not believe that requiring adherence to such a standard will be so burdensome or impracticable as to warrant reliance on publication notice alone." *Pope, supra.* Indeed, if Davis would have been given notice that Upton was delinquent in certain loans to FNB, Davis, in accordance with the rights expressly granted under the Subject Lease, may have paid the mortgage on the Subject Tract and have become subrogated to the rights of FNB, thus relieving FNB and the Sheriff of "a more substantial administrative burden" (i.e., the seizure and subsequent sale of the Subject Tract).

To the extent that the Fifth Circuit may have relied upon La. R.S. 13:3886 (which provides for notice upon request) as support for its holding that Davis was not entitled to direct notice, a different panel of the Fifth Circuit, only a few weeks later, in the case of *Small Engine Shop, Inc. v. Cascio,* 878 F.2d 883 (5th Cir. 1989) clearly established that the aforesaid ". . .statute does not relieve the responsible state actor in a particular case from exercising the 'reasonable diligence' appropriate in the circumstances to ascertain, reasonably, the identity of an individual or entity subject to the deprivation of property". Id. at 893 n.9, see also 891-93. FNB, the Sheriff and the State of Louisiana were not relieved of their constitutional obligation to provide Davis with actual notice either by mail or other means "as certain to ensure actual notice" by La. R.S. 13:3886.

The Fifth Circuit ignored the fact that FNB did not

request a Conveyance Certificate (a/k/a Certificate of Non-Alienation) listing sales or other alienations, including oil, gas and mineral leases affecting the Subject Tract. A Conveyance Certificate is similar to a Mortgage Certificate (which latter certificate was obtained by FNB prior to the Sheriff's Sale) with the only difference being that a Conveyance Certificate lists alienations of rights in the property instead of encumbrances on the property. With minimal effort and expense FNB could have obtained a Conveyance Certificate in Upton's name at the same time that a Mortgage Certificate was obtained which would have shown the existence of the Subject Lease. Ms. Broussard also testified that the Clerk of Court's Office for Lafayette Parish, Louisiana, had a research department which could have been consulted by FNB free of charge, to ascertain within "two minutes" whether or not the Subject Tract was covered and affected by a mineral lease. If any reasonably diligent effort had been made, the legally protected recorded property interest of Davis in the Subject Tract would have been easily and quickly ascertained.

It is undisputed that under *Mullane, Mennonite, supra,* and their progeny that a third party purchaser *(i.e.,* a person who buys property which is subject to a mortgage but who does not assume the mortgage) is entitled to some type of direct notice. The Conveyance Records would have to be examined in order to ascertain if the Subject Tract had been sold to a third party. During this required examination of the Conveyance Records, the existence of the Subject Lease and the name and address of its owner would have been easily discovered.

CONCLUSION

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Mullane,* 70 S.Ct. at 657.

Due Process is not "a technical conception" of "inflexible procedures", nor is it a "mechanical instrument" or "yardstick"; it is rather a "delicate process of adjustment" and a balancing of interests in which it is recognized that in the instant matter Due Process concerns tip the balancing of interests in favor of petitioners, Davis, et al.

Publication in the Lafayette, Louisiana *Daily Advertiser* was not reasonably calculated to reach Davis in New Orleans and, therefore, such notice was constitutionally insufficient. Davis did what it was required to do under the Louisiana Public Records Doctrine by recording its interest in the Subject Tract. Accordingly, under *Mennonite* and the current jurisprudence of this Court and under the jurisprudence of the Sixth Circuit, Davis as holder of a legally protected recorded property interest was entitled to actual notice. We are not suggesting, however, that foreclosing creditors, Sheriffs or the State of Louisiana be required to undertake extraordinary efforts to discover the identity and whereabouts of a person whose identity is not in the Conveyance Records - only that they do the routine examination of the Conveyance Records as envisioned by *Mennonite*. Lastly, we agree that if a foreclosing creditor's reasonable diligence does not uncover the identity of a mineral interest owner, then, in that event, the foreclosing creditor is not obligated to provide actual notice of the foreclosure proceedings to the mineral interest owner.

Contrary to the holding of the Fifth Circuit, FNB and the Sheriff were required to use reasonable diligence to ascertain if parties with property interests (such as Davis) existed prior to the Sheriff's Sale. They made no effort whatsoever, and such actions are clearly in violation of the constitutional protection of the Due Process Clause as interpreted by this Court. Accordingly, the Fifth Circuit was in error by ignoring the decisions of this Court that notice

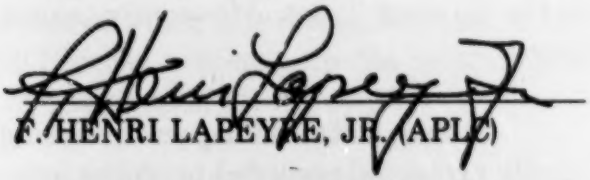
by mail or other means as certain to ensure actual notice is a minimum constitutional precondition before extinguishing (or even diminishing) Davis' recorded interest in the Subject Tract. *Mennonite, supra.* See also, *Verba, supra.*

As demonstrated herein the extinguishment of one's legally protected recorded property interest without direct notice is clearly a violation of the principles set forth in the current jurisprudence of this Court and is a matter of utmost concern and therefore requires consideration by this Court to avoid conflicting interpretations of such principles by the Circuit Courts. *In the case at bar the Conveyance Records were never checked prior to the foreclosure.* Banks and other foreclosing creditors should not be excused from examining the Conveyance Records by asserting, without really knowing what is contained in such records, that such an examination could possibly be unduly burdensome and complicated and thus, in spite of their failure to exert any effort at all, be relieved of their Due Process obligations to provide actual notice to owners of recorded property interests as required by this Court in *Mennonite* and the Sixth Circuit in *Verba. In Louisiana the Public Records (the Mortgage and Conveyance Records) are the only records which one customarily examines to identify persons with interests in property. Third parties are not bound by any interest which is not so recorded. In the instant case no attempt was made to examine the Conveyance Records.*

Accordingly for these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,



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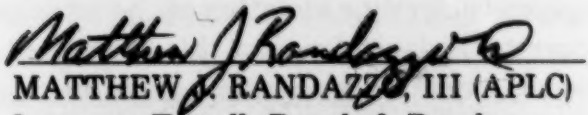

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rules 28 and 33 of the United States Supreme Court three copies of the foregoing Petition for Writ of Certiorari have been forwarded to each of the following attorneys representing the respondents in the litigation heretofore, to-wit:

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by depositing same in the United States Mail, postage prepaid and properly addressed, this 8th day of September, 1989.

Matthew J. Randazzo III

MATTHEW J. RANDAZZO, III

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4940

DAVIS OIL COMPANY, ET AL.,
Plaintiffs-Appellants

v.

WILLIAM P. MILLS, III, ET AL.,
Defendants-Appellees.

****

WILLIAM P. MILLS, III, ET AL.,
Plaintiffs-Appellees,

v.

DAVIS OIL COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

(May 15, 1989)

Before KING, JOHNSON and JOLLY, Circuit Judges.

KING, Circuit Judge:

1.

Plaintiff-appellant Davis Oil Company appeals from the judgment of the district court holding that the Due Process Clause of the fourteenth amendment does not require that a foreclosing mortgagee provide actual notice to a mineral lessee whose lease will, under Louisiana law, be extinguished by the seizure and sale of the subject property.

For the reasons set forth below, we affirm the judgment of the district court.

A. Facts

The underlying facts of this case are largely undisputed and were found by the district court as follows.

In August of 1977, Kenneth Upton ("Upton") purchased a 16.43 acre tract of land (the "tract") located in Lafayette Parish, Louisiana. In May of 1983, Upton mortgaged the property as collateral for a $500,000 loan from defendant First National Bank of Lafayette ("FNB"). The collateral mortgage was properly recorded in the mortgage records of Lafayette Parish. The loan was intended to finance Upton's business, American Tools, Inc.

In November, 1983, Upton granted a mineral lease on the tract to Louisiana Land Management, Inc. ("LLM"). The lease was promptly recorded in the Lafayette Parish conveyance records. On January 30, 1984, LLM assigned the lease to plaintiff Davis Oil Company ("Davis"). This assignment was also promptly recorded.

Upton then defaulted on the loan and on other obliga-

tions to FNB in April, 1984. FNB filed suit against Upton and American Tools, Inc., alleging default on the mortgage encumbering the tract. Upton confessed judgment and waived all delays. The judgment reflected a total debt of $3,500,000 and rcognized the mortgage affecting the property.

In execution of its judgment, FNB obtained a writ of *fieri facias,* ordering the Lafayette Parish Sheriff to seize property belonging to Upton. FNB targeted certain properties, including the land leased to Davis, for seizure and judicial sale. FNB was unaware of the mineral lease on the tract. On May 30, 1984, the Sheriff sold the land to FNB after obtaining a certificate of nonmortgage. A deed reflecting the sale was recorded in June, 1984. No actual notice was afforded Davis although the judicial sale was advertised in compliance with article 2331 of the Louisiana Code of Civil Procedure.

On March 10, 1984, a Davis Oil Company well located on property adjacent to the subject tract "blew out," indicating a significant hydrocarbon discovery. In August, 1984, Davis assigned portions of its interest in the lease to Exxon Corporation, Grace Petroleum Corporation, NWT Natural Resources Company, Saturn Energy Company, and Allen E. Paulson (these various assignees will be included in references to "Davis"). These assignments were recorded in November, 1984.

In September, 1984, Davis gave notice that it planned to apply to the Commissioner of Conservation for the establishment of a production unit for Bayou Tortue Well No. 4, incorporating the subject tract. Because defendant William P. Mills III ("Mills") owned nearby property, he was provided with notice of this intent.

On October 31, 1984, Mills and FNB entered into a letter agreement in which FNB agreed to sell the subject tract to Mills. Negotiations continued over the warranty that FNB would deliver. In the interim, Mills obtained a title opinion which specifically questioned the validity of the sheriff's sale on the ground that the mineral lessee may not have received notice of the foreclosure.

On February 4, 1984, the Commissioner of Conservation signed an order incorporating a portion of the subject tract into the Bayou Tortue Well No. 4 production unit. This act guaranteed the subject tract a share in the production from the unit. On February 12, 1985, Mills, John L. Robertson, Brenda Sue Harmon Robertson, Orel Bridges, Jr., and Ethel Sue Hoffpauir Bridges (collectively included in references to "Mills") purchased the subject tract. The contract stipulated that the sale was subject to recorded leases. The sale was recorded the following day.

Davis filed suit in the Federal District Court for the Western District of Louisiana on July 1, 1985. Jurisdiction was based on the presence of a civil rights claim, 28 U.S.C. § 1343(3) and diversity of citizenship, 28 U.S.C. § 1332. Davis sought a declaratory judgment that the sheriff's sale of the subject tract was invalid because Davis had not been provided with direct notice of the seizure and impending sale, in violation of the Due Process Clause. Second, Davis sought equitable relief for the increased value of the subject tract resulting from a well Davis had drilled on land adjacent to the tract and within the same production unit. Third, Davis sought a declaratory judgment that its lease could not, as a matter of Louisiana state law, be extinguished by a judicial sale enforcing FNB's judgment. Finally, Davis asked for a declaratory judgment that the subject tract, again as a matter of Louisiana state law, was burdened by the lease because Davis recorded its lease

prior to the sale of the property to Mills and the contract between Mills and FNB provides that the tract is subject to prior recorded leases, thereby estopping Mills from asserting otherwise.[1]

B. *The District Court Opinion*

The district court, after a trial on the briefs and documentary evidence, denied relief to Davis on all counts. First, the district court held that although the sheriff's sale constituted state action, and although the lease was a protected property interest, deprivation of which is subject to the constraints of the Due Process Clause, constructive notice was reasonaable in this case. Second, the district court found that Davis was not entitled to equitable relief for any enhancement in the value of the subject tract because Davis had a statutory remedy under section 30.5(c)(3) of the Louisiana Revised Statutes. Third, the district court found that as a matter of Louisiana Law, Davis' lease was extinguished by the sale because the consent judgment obtained against Upton was properly considered a foreclosure by ordinary proceeding which extinguishes all subordinate obligations such as Davis' lease which was subsequent in time to the mortgage. Finally, the district court held that no concept of estoppel applied to prevent Mills from claiming that the subject tract was not burdened by the lease.

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[1] Mills filed a petition in Louisiana state court on January 10, 1986, seeking cancellation of Davis' lease and damages for the defendants' alleged failure to pay Mills a share fn the production from the unit that includes the disputed parcel of land. Mills' suit was removed to federal court on grounds of diversity of citizenship and was consolidated with Davis' lawsuit against Mills and FNB. The district court held that Mills' petition to cancel the lease was rendered moot by the court's decision that the Sheriff's sale was constitutionally sound and had extinguished Davis' lease on the subject tract of land.

Davis filed a timely notice of appeal from the district court's judgment.

C. *Claims on Appeal*

Davis argues on appeal that the district court erred in concluding that constructive notice of the seizure and sale of the subject property satisfied the requirements of due process.[2] Davis contends that its identity was easily and readily ascertainable from the conveyance records of Lafayette Parish and that absent an effort to provide Davis with actual notice of the sheriff's sale of the subject tract, the sale was constitutionally flowed at least insofar as it extinguished Davis' interest in the subject tract. Mills and FNB advance three arguments on appeal. First, they argue that the foreclosure did not constitute action under color of state law. Second, they contend that even if there was state action, Davis was not "deprived" of a legally protected property interest because its lease was subordinate to the mortgage -- thus, the property interest was simply extinguished by operation of a legal condition. Finally, they assert that even if Davis was deprived of a legally protected property interest, constructive notice was sufficient to satisfy the requirements of due process because Davis failed to avail itself of Louisiana's "request notice" provision, La. Rev. Stat. Ann. 13:3886 (West Supp. 1988).

This case therefore presents three issues on appeal: first, whether the district court erred in finding state action, second, whether the district court erred in finding that Davis was deprived of a legally protected interest and

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[2] Davis does not challenge on appeal any of the district court's state law holdings. Although Davis does maintain that its lease was not extinguished by the Sheriff's sale, its argument on appeal is based solely on the Due Process Clause and not on Louisiana state law. Our Opinion therefore addresses only the constitutional issues.

third, whether constructive notice satisfied the Due Process Clause. We address these issues in turn.

D. *Standard of Review*

This action was submitted to the district court for trial on briefs and documentary evidence. The district court's findings of fact, although based solely on documentary evidence, are subject to the clearly erroneous standard of review. Fed. R. Civ. P. 52(a) & advisory committee's note (1985). Accordingly, we may not reverse the district court's factfindings unless we are left, after reviewing the entire evidence, "with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City,* 470 U.S. 564, 573 (1985). The district court's conclusions of law, however, are freely reviewable on appeal. *See Inwood Labs v. Ives Labs,* 456 U.S. 844, 855 n.15 (1982).

II.

As a preliminary matter, it is useful to review the salient features of the Louisiana procedures that are at issue in this case.[3]

Louisiana law provides two means of enforcing a mortgage. La. Code Civ. P. art. 3721 (West 1961 & Supp. 1988). When a mortgage contains a confession of judgment, a mortgagee may foreclose on the mortgage through executory process which is an action *in rem. Id.* art. 2631. The mortgagee must file a petition to enforce the mortgage, requesting the seizure and sale of the subject proper-

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[3] For a more detailed description of Louisiana's procedures, see Rubin & Carter, *Notice of Seizure in Mortgage Foreclosures and Tax Sale Proceedings: The Ramifications of Mennonite,* 48 La. L. Rev. 535, 541-44 (1988).

ty. *id.* art. 2634. The judge reviews the petition and supporting documents, *Id.* art. 2635-37, and orders the issuance of a writ of seizure and sale, commanding the sheriff to seize and sell the property affected by the mortgage. *Id.* art. 2638. The statutory scheme for executory proceedings includes no express requirements of actual notice,[4] except that the debtor is entitled to written notice of the seizure of the subject property — after the judgment has been rendered. *Id.* art. 2721. The only other notice required is the advertisement of the sheriff's sale. *Id.* art. 2722.

If the original mortgagor has sold the property to a third party, the mortgagee may nevertheless enforce the mortgage, by executory process, directly against the property, without regard to the alienation of the property to a third party.[5] *Id.* art. 2701 (creating a statutory *pact de non alienando* for all mortgages containing a confession of judgment). In the case of executory proceedings, there is no statutory requirement that the present owner receive notice of the seizure. *Id.* art. 2721; *but see Bonner v. B-W Utilities,* 452 F. Supp. 1295, 1302 (W.D. La. 1978) (third possessor whose name and address were known to mortgagee was constitutionally entitled to notice of seizure).

Alternatively, if the mortgage does not contain a confession of judgment, the mortgagee must first obtain a money judgment against the mortgagor. Thus, an ordinary

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[4] The sheriff is required to issue a demand for payment three days before the writ of seizure and sale is issued, but the mortgagor may waive the right to receive the demand for payment. La. Code Civ. P. arts. 2639-40.

[5] Such third parties do, however, have a statutory right to enjoin the sale and to retire the indebtedness. La. Code, Civ. P. arts. 2702-03 (rights, respectively, of those who buy property subject to a mortgage (without assuming the debt) and those who purchase the property and assume the debt); *see also infra* note 6.

proceeding differs from an executory proceeding in that the mortgagor must be made a party to the action and must therefore receive notice of the foreclosure proceeding itself. La. Code Civ. P. art. 1201 (West 1984 & Supp. 1988). The judgment is then executed by a writ of *fieri facias* under which the Sheriff of the Parish will seize and sell the mortgagor's property to satisfy the judgment. *Id.* art. 2291. A mortgagee may enforce a judgment obtained by ordinary process without reference to any alienation or transfer of the property, *id.* art. 3741 (also creating statutory *pact de non alienando),* but both the original mortgagor and the present owner of the property are entitled to notice of the seizure.[6] *Id.* art. 3742. The only other notice expressly required by statute is again the advertisement of the sheriff's sale. *Id.* art. 2331 (notice of sale of property under writ of *fieri facias).*

The effect of a sale pursuant to foreclosure by either method[7] is to extinguish all inferior encumbrances upon the property.[8] *Id.* art. 2376. The property is sold, however,

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[6] Third parties claiming ownership are, like the judgment debtor, entitled to enjoin the sale of the property on specified grounds. La. Code. Civ. P. art. 2298 (West Supp. 1988). In an ordinary proceeding, third persons asserting a mortgage or privilege — whether superior or inferior to that of the seizing creditor — may also intervene at any time prior to the sale and seek to enjoin the sale until their claims are adjudicated. *Id.* art. 1092 (Wesst 1984). When a judgment obtained under either ordinary or executory process is sought to be enforced against a third party in possession of the property, the third possessor is authorized by statute to arrest the seizure (on specified grounds) and to retire the balance of the indebtedness. *Id.* art. 3743 (West 1961) (containing cross reference to article 2703).

[7] Article 2724 provides that a sale of property under a writ of seizure and sale issued in an executory proceeding is governed by the same provisions which apply to a sale under a writ of *fieri facias.*

[8] Inferior creditors are to be paid out of the sale proceeds, after costs are deducted, and the seizing creditor has been paid. La. Code Civ. P. arts. 2373, 2377 (West 1961).

subject to any real charge or lease *superior* to the mortgage of the seizing creditor. *Id.* art. 2372.

Finally, an additional feature of the Louisiana scheme is the so-called request-notice provision contained in Revised Statute 13:3886. La. Rev. Stat. Ann. 13:3886 (West Supp. 1988). Under RS 13:3886, any person may obtain notice by mail of the seizure of immovable property by paying a ten dollar fee and placing his or her name and address on file in the mortgage records of the Parish where the property is located. One question before us in this case is the extent to which RS 13:3886 cures any constitutional defects in Louisiana's constructive notice provisions.

We proceed now to the issues presented on appeal.

A. *Color of State Law*

FNB maintains that the district court erred in finding that FNB, a private party, acted under color of state law in foreclosing on Upton's property and in executing its judgment.

To state a cause of action under 42 U.S.C. § 1983, a plaintiff must allege first, that he or she has been deprived of a right "secured by the Constitution and laws" of the United States, and second, that the deprivation was by a person acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . . " *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Daniel v. Ferguson*, 839 F.2d 1124, 1128 (5th Cir. 1988); *Frazier v. Board of Trustees of Northwest Mississippi Regional Medical Center*, 765 F.2d 1278, 1283 (5th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986); *Roberts v. Louisiana Downs*, 742 F.2d 221, 223 (5th Cir. 1984).

For a party to be subject to suit under section 1983, the asserted deprivation of rights must stem from conduct fairly attributable to the state. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). This requirement, "whether good or bad policy," reflects a basic tenet of our political order that "most rights secured by the Constitution are protected only against infringement by governments" and not by private parties. *Id.* at 936-37 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 139, 156 (1978)); *Frazier*, 765 F.2d at 1283.

The actions of a private party may therefore be attributed to the state only if two conditions are met:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937; *Daniel*, 839 F.2d at 1130.

Although a myriad of tests have been applied to determine whether a party acts under color of state law, we think that Davis' claims are sufficiently analogous to the prejudgment attachment cases to fall under the "joint participation" test applied in *Lugar*.[9] *See Lugar*, 457 U.S. at 939.

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[9] The prejudgment attachment cases are obviously not apposite insofar as Davis was not a debtor of FNB. These cases *are* analogous, however, insofar as Davis' central contention is that the Louisiana procedure provides for the termination of all subordinate interests in the subject property, without requiring constitutionally adequate notice to the holders

The plaintiff in *Lugar* alleged that he had been deprrived of his property without due process of law when a private creditor sought and obtained prejudgment attachment of his property pursuant to a Virginia statute. The writ of attachment had been executed by the County Sheriff. The Court concluded that insofar as the plaintiff alleged only that his creditor had invoded the attachment statute without sufficient grounds to do so, he did not state a cause of action under section 1983. To the extent, however, that the plaintiff challenged the attachment procedure as defective under the fourteenth amendment, the Court found that he did state a valid cause of action. *Id.* at 940-41.

The Court reasoned that "[w]hile private misuse of a state statute does not describe conduct that can be attributed to the State, the procedural scheme created by the statute obviously is the product of state action." *Id.* at 941. The Court found that the procedural scheme "is subject to constitutional restraints" and may be addressed in a section 1983 action, as long as the second requirement — that the defendant "may fairly be said to be a state actor" — is also met. *Id.* the Court noted that it had "consistently held that a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Id.* The Court then concluded that "[w]hatever may be true in other contexts," joint participation does not require more than invoking the aid of state officials, "when the State has created a system whereby state officials will attach property on the *ex parte*

(Footnote 9 continued)
of such interests. As we discuss more fully below, any distinction between Davis' claims and those of a debtor subject to a prejudgment attachment statute turns not on the nature of the underlying constitutional claim, but on the nature of the property interest at stake.

application of one party to a private dispute." *Id.* at 942; *see also North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1974) (state-created garnishment procedure); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (execution of vendor's lien to secure disputed property); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (state-created prejudgment replevin procedure); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (state-created garnishment procedure).

To the extent that *Lugar* adopts a low threshold to establish joint participation between a private party and the state, its holding has been confined to the context of ex parte prejudgment proceedings.[10] *Lugar*, 457 U.S. at 939 n.21 ("The holding today, as the analysis makes clear, is limited to the particular context of prejudgment attachment."); *Earnest v. Lowentritt*, 690 F.2d 1198, 1201 (5th Cir. 1982).

In claiming that FNB did not act under color of state law, defendants rely primarily on *Earnest v. Lowentritt*, in which we held that the "[i]nitiation of foreclosure proceedings pursuant to a mortgage implicates no . . . authority of state law." 690 F.2d at 1201.

In *Earnest*, we distinguished the mortgage foreclosure at issue from the pre-adjudicative seizures discussed in *Lugar* and noted that the execution order permitting the sheriff to sell the Earnest property was obtain-

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[10] We recently noted, however, that in *Pennzoil v. Texaco*, 481 U.S. 1 (1987), four justices were willing to find state action in a private party's invocation of a state's postjudgment collection procedures. *Howard Gault Co. v. Texas Rural Aid, Inc.*, 848 F.2d 544, 553 (5th Cir. 1988).

Justices Brennan, Marshall and Blackmun all agreed with the portion of Justice Stevens' concurring opinion that would have found state action. *Pennzoil*, 481 U.S. at 19, 27 (Brennan, & Blackmun, JJ. concurring); *id.* at 30 & n.1 (Stevens & Marshall, JJ. concurring).

ed after the debtor had been given notice of the impending seizure and an opportunity to be heard on the merits of the seizure. Because the proceeding at issue in *Earnest* could not be characterized as ex parte, the mere invocation of state procedures by a private party was not sufficient to establish state action. *Id.* at 1201-02. We cautioned that a contrary holding would "transform every foreclosure action between private parties into state action of constitutional dimension." *Id.* at 1202.

This case, however, does not present the same issue. In arguing that *Earnest* is controlling here, defendants fail to recognize that it is Upton, rather than Davis, who stands in the shoes of the Earnest plaintiffs. Although the foreclosure was not ex parte with respect to Upton (who received notice and did not contest the foreclosure), the gravaman of Davis' complaint is that the Louisiana procedure allows foreclosure and the execution of a judgment pursuant to foreclosure without providing constitutionally adequate notice to other parties whose interests in the property will be extinguished along with the debtor's by the seizure and sale of the property. Thus, as the district court noted, Davis'claim is precisely that the procedure is ex parte with respect to parties in its position.

We agree with the disstrict court that insofar as Davis challenges the constitutionality of the Louisiana procedure on these grounds, FNB may be considered a "joint participant" with the state because it set into motion the procedures that would extinguish Davis' interest in the subject property.[11] *See Folsom Investment Co. v. Moore,*

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[11] A holding to the contrary would require us to ignore the nature of Davis' constitutional claim. If we were to hold that FNB did not act under color of state law with respect to Davis, we would effectively hold that the only person who may maintain a section 1983 suit challenging

681 F.2d 1032, 1037 (5th Cir. 1982) (applying *Lugar* but adopting qualified immunity from monetary damages for parties who seek to secure their rights under a presumptively valid attachment statute). Similarly, although we have suggested that establishing action under color of state law may not always be sufficient to establish state action for purposes of the fourteenth amendment, we conclude that this case is sufficiently similar to *Lugar* itself to find both elements.[12] *See Frazier*, 765 F.2d at 1282 & n.7.

(Footnote 11 continued)
the constitutionality of a private creditor's seizure or sale of property is the debtor — when the plaintiff's complaint is precisely that the state may not permit the termination of other interests in the disputed property without requiring adequate notice to those interest holders. This question is more properly addressed by considering whether Davis in fact had a property interest protected by the fourteenth amendment, rather than subsuming the question in the state action inquiry.

[12] The Court cautioned in *Lugar* that "under color of any statute" should not be read "in such a way as to impose a limit on those Fourteenth Amendment violations that may be redressed by the § 1983 cause of action." 457 U.S. at 934. Relying on the legislative history of the Civil Rights Act of 1871, the Court emphasized that Congress intended the remedies available under § 1983 to be coextensive with the protections of the fourteenth amendment. *Id.*

On the other hand, the Court noted that "[i]f action under color of state law means nothing more than that the individual act 'with the knowledge of and pursuant to that statute,' . . . then clearly under *Flagg Brothers* that would not, in itself, satisfy the state-action requirement of the Fourteenth Amendment." *Id.* at 935 n.18 (citation omitted). This case, however, like *Lugar*, may be distinguished from *Flagg Brothers*.

In *Flagg Brothers*, the Court found that the private defendants did not act under color of state law in threatening to sell the plaintiffs' property pursuant to U.C.C. § 7-210. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978). The plaintiffs in *Flagg Brothers* argued that in authorizing private storage companies to sell stored goods in satisfaction of deliquent accounts, the state had delegatged a traditionally public function to private entities. *Id.* at 161. Similarly, the Court found that New York had not compelled the sale of the disputed property but had simply outlined the circumstances "under which its courts will not interfere with a private sale." *Id.* at 166.

B. *Protected Property Interest*

Although the defendants do not dispute that a mineral lease is a legally protected property right under Louisiana law,[13] they argue on appeal that Davis was not

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(Footnote 12 continued)

Flagg Brothers itself, however, distinguished the Court's earlier prejudgment attachment cases. *Id.* at 160 n.10. In this case, as in *Lugar* and the other prejudgment attachment cases, the claim is not simply that the private defendant acted "with the knowledge of and pursuant to" the state procedural scheme in conducting a private sale. Under the Louisiana procedure, the sheriff seizes the property and advertises and conducts the sale. State law provides that property sold pursuant to this procedure will pass, free of all junior encumbrances, to the purchaser. *See supra* (description of Louisiana foreclosure procedures). Thus the state not only provides the legal framework whereby other interests in the subject property are terminated, it also is "intimately involved" with the execution of the procedures which accomplish the termination of such interests. This is sufficient to establish state action for purposes of the fourteenth amendment. *See Tulsa Professional Collection Services v. Pope*, ___ U.S. ___, 108 S.Ct. 1340, 1345 (1988).

For the reasons set forth in the text, we do not believe that this holding is inconsistent with cases that have not found state action in nonjudicial foreclosures by private parties. *See Barrera v. Security Building & Investment Corp.*, 519 F.2d 1166, 1174 (5th cir. 1975) (finding no state action in nonjudicial foreclosure under Texas statute); *Mildfelt v. Circuit Court of Jackson County, Missouri*, 827 F.2d 343, 346 (8th Cir. 1987) (no state action in extrajudicial foreclosure where Missouri law simply recognized validity of contractual power of sale provisions). The arguably ex parte character of the procedures combined with the extensive involvement of state officials, is sufficient to establish state action where it would not otherwise be found.

Because we read Davis' claim to be essentially analogous to the Court's prejudgment attachment cases, we do not need to reach the question of when action "under color of state law" would not also be state action for fourteenth amendment purposes. Both elements are present here.

[13] Under Louisiana law, mineral rights are "real" rights and the owner "may assert, protect, and defend his right in the same manner as the ownership or possession of other immovable property." La. Code Civ. P. art. 3664 (West Supp. 1988); *see also* La. Rev. Stat. Ann. § 31:16 (West 1989).

"deprived" of that right within the meaning of the Due Process Clause of the fourteenth amendment.

Defendants rely on the axiom that property interests "are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). They argue that the "dimensions" of property rights in a leasehold are defined by Louisiana law to terminate upon judicial sale of the property pursuant to a foreclosure on a mortgage superior to the lease. *T.D. Bickham Corp. v. Hebert*, 432 So.2d 228, 230 (La. 1983). Defendants contend that the termination of property rights, consistent with the limitations to which the right is subject, is not a deprivation of property within the meaning of the fourteenth amendment.

In support of this argument, defendants rely primarily on *FDIC v. Morrison* — an Eleventh Circuit case in which the court held that although a mortgagor's equity of redemption is a legally protected property right, "[f]oreclosure within the contractual terms and the requirements of Alabama law did not deprive [the mortgagor] of his equity of redemption, but only terminated it." 747 F.2d 610, 615 (11th Cir. 1984), *cert. denied*, 474 U.S. 1019 (1985). The court reasoned that where the state simultaneously grants a property right and subjects that right to substantive limitations, the right must be defined in terms of its limitations. *Id.* at 615 n. 10. The court found that the equity of redemption is defined by Alabama law to exist only up to the moment when the mortgagee exercises the power of sale and concluded that "[b]ecause foreclosure and the equity of redemption cannot overlap, it is impossible that this foreclosure infringed on Morrison's right." *Id.* at 615. Morrison was therefore not entitled to notice of the

impending sale of the subject property. *Id.* at 616.

Similarly, defendants argue, Louisiana law ranks property interests chronologically, according to the date that an interest is recorded and provides clearly that subordinate property interests will be canceled by a superior creditor's foreclosure on the property. *See supra* (summary of Louisiana foreclosure procedure). Furthermore, "[a]ll persons are held to have constructive notice of the existence and contents of recorded instruments affecting immovable property." *Judice-Henry-May Agcy. Inc. v. Franklin*, 376 So.2d 991, 992 (La. App. Cir. 1 1979), *writ. ref'd*, 381 So.2d 508 (La. 1980). Defendants contend that Davis was therefore charged with notice of the mortgage in favor of FNB which was recorded at the time the mineral lease was executed. Defendants note that Davis could have negotiated with FNB to subordinate the mortgage to the mineral lease. Because Davis failed to do so, however, its rights in the leasehold were limited from their inception by the existence of a superior mortgage. Defendants conclude that as in *Morrison* FNB's foreclosure therefore did not "deprive" Davis of any property right within the meaning of the fourteenth amendment, but simply terminated the right consistent with the conditions to which the lease was subject.

The Eleventh Circuit's reasoning in *Morrison* illustrates the persistent difficulty of defining the rights in property that are subject to constitutional protections.[14] Although the Supreme Court has recognized that the states have broad power to create and define the scope of property rights, the Court has also recognized that a purely

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[14] *See* L. Tribe, American Constitutional Law §§ 9-7, 10-8-12 (1988); Flax, *Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition*, 60 Tulane L. Rev. 889 (1986).

positivist view of property rights threatens to render the Due Process Clause meaningless.

Three justices pressed the positivist notion of state-created property rights to its logical limits in *Arnett v. Kennedy,* arguing that "where the grant of a substantive right is inextricably interwined with the limitations on the procedures which are to be employed in derermining that right, a litigant in the position of appellee must take the bitter with the sweet." 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.).

The "bitter with the sweet" aproach was resoundingly rejected, however, by a majority of the court in subsequent cases:

> [I]t is settled that the "bitter with the sweet" approach misconceives the constitutional quarantee . . . The point is straightforward: the Due Process Clause provides that certain substantive rights — life, liberty, and property — cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest . . . , it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) (quoting *Arnett,* 416 U.S. at 167 (Powell, J., concur-

ring in result in part)); *see also Logan v. Zimmerman Brush*, 455 U.S. 422, 432 (1982) (adherence to "bitter with the sweet" approach would allow the State to destroy at will virtually any state-created property interest); *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (minimum procedural protections afforded by the Constitution are not diminished by fact that State provides its own procedures).

Although the Eleventh Circuit in *Morrison* attempted to avoid the trap of *Arnett* by characterizing the limitation at issue as substantive rather than procedural, 747 F.2d at 615 n.10, we do not find their reasoning entirely persuasive in the context of this case.[15]

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[15] Although the Court has held that where the state alters the substantive definition of property rights, the legislative determination may provide all the process that is due, *Logan*, 455 U.S. at 421-22, the state's power to alter the substantive definition of property rights is not without limitation.

In *Webb's Fabulous pharmacies, Inc. v. Beckwith*, the Supreme Court invalidated as an unconstitutional taking a Florida statute which authorized the county clerk to invest moneys deposited with the registry of the court in interest-bearing accounts and provided that all interest accruing from such deposits would be deemed the property of the office of the clerk of the court. 449 U.S. 155, 164 (1980). The state reasoned that without statutory authorization to invest registry deposits in interest-bearing accounts, the deposit would have earned no interest at all — thus, the state took only what it created. *Id.* at 158. While the Court acknowledged that apart from the statute, there was no requirement that interest be earned on a registry deposit, it rejected the state's contention that it was therefore entitled to assume ownership of the interest. *Id.* at 162.

The court noted that the principal deposited in the registry "plainly was private property," and emphasized that "[t]he usual and general rule" is that interest follows the principal. *Id.* at 160, 162. The Court concluded that the state's attempt to alter the traditional understanding that "earnings of a fund are incidents of ownership of the fund" violated the Taking Clause of the fifth amendment: "a State by *ipse dixit*, may not transform private property into public property without compensation." *Id.* at 164.

The simple act of labeling a condition "substantive" does not eliminate due process concerns. At some point, to hold that no due process attaches to the operation of a "substantive" condition that terminates a property right is to define the scope of that property right by the *absence* of procedural protections attendant upon its termination. This too reduces the due process clause to a tautology.

Moreover, to apply the Eleventh Circuit's reasoning to this case would extend *Morrison* far beyond its original context. The court emphasized in *Morrison* that "[t]he blame for turning the once-hypothetical foreclosure into reality lies solely with the mortgagor." 747 F.2d at 615. In other words, it was the mortgagor's own default which set into motion the condition which terminated his equity of redemption. The defendants' argument here would lead to the conclusion that any subordinate property interest is, in effect, "conditioned" by the existence of superior interests in the property. On this logic, a foreclosure that terminates subordinate interests would never "deprive" the inferior interest holder of property within the meaning of the fourteenth amendment.[16] An inferior interest holder, however,

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[16] Two commentators discussing the implications of *Mennonite* for Louisiana's mortgage foreclosure scheme advance an argument similar to defendants' argument. They note that a tax sale — the procedure at issue in *Mennonite* — is different from ordinary foreclosure proceedings precisely because it does upset the state-defined ranking of property interests:

> *Mennonite* addressed a taxing authority's actions that caused erasure of otherwise *superior* liens and encumbrances — a situtation that cannot arise in conventional foreclosures. One could contend that *Mennonite's* holding is limited to situations where the state "boot-straps" itself into a superior ranking position. In that instance, absent notice, a mortgagee has no way of knowing when the the security interest may be affected, because pre-loan precautions in ob-

has no control over the property owner's default on a superior obligation and thus no control over the *operation* of the condition to which his or her interest is subject. Therefore, even if the ranking of property interests according to the Louisiana statutory scheme alters the substantive definition of those rights, we decline to hold that due process does not attach to a foreclosure by a party holding a superior interest in the property.

The Supreme Court has not allowed the State's power to impose conditions on property rights to encroach this far on the protections afforded by the due process clause. Rather, the circumstances in which the termination of a property interest by operation of a legal condition does not trigger due process concerns are limited.

In *Texaco Inc. v. Short*, for example, the Court upheld an Indiana statute which provided that a severed mineral interest which was unused for a period of 20 years would lapse and revert to the surface owner, unless the mineral owner filed a statement of claim in the county recorder's office. 454 U.S. 516 (1982). The Court noted that a state may "condition the retention of a property right upon the performance of an act within a limited period of time." *Id.* at 529. The Court then rejected the plaintiffs'

(Footnote 16 continued)

> taining a title opinion (or title insurance) and checking the mortgage records will not suffice to protect against subsequent tax sales. An inferior lien holder, on the other hand, can determine whether it will be primed by private party superior liens. Since property rights generally are created by state law, and state law can dictate which rights are given superior preference, one can argue that an inferior mortgagee in effect "assumes the risk" that its mortgage not only may be primed but also may be extinguished by a foreclosing superior lienholder.

Rubin & Carter, *suppra* note 3, at 549 (1988).

argument that a mineral interests could not be extinguished absent advance notice that a 20-year period of nonuse is about to expire. *Id.* at 538. The Court emphasized the "difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Id.* at 533. While due process constraints, including the requirement of adequate notice to the mineral owner, would apply to a subsequent quiet title action "that would determine conclusively that a mineral interest has reverted to the owner," They did not attach to the operation of the statutory condition itself which the Court compared to a self-executing statute of limitations. *Id.* at 534-36. The Court concluded that an individual need not be given advance notice of the operation of a rule of law that applies uniformly to all citizens and clearly delineates the conditions on which a property interest may be terminated.[17] *Id.* at 537; *see also County Line Joint Venture v Grand Prairie, Texas,* 839 F.2d 1142, 1146-47 (5th Cir.) (relying on *Short* to uphold city ordinance that provided for automatic termination of special use permits that

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[17] In *United States v. Locke* the Court upheld an analogous provision of the Federal Land Policy and Management Act ("FLPMA") which established a recording system for mining claims on federal lands and provided that claims would be deemed abandoned if the claimant failed to register the claim initially with the Bureau of Land Management or failed to file with state officials each year thereafter a notice of intention to hold the claim and an affidavit or report regarding work performed on the claim. 471 U.S. 84, 86-89 (1985). Noting that "BLM does provide for notice and a hearing on the adjudicative fact of whether the required filings were actually made, " the Court held that due process did not require individualized notice of the filing deadlines. *Id.* at 109 & n.17.

The Court also noted that "[i]n the exercise of its administrative discretion," BLM had for the past several years elected to mail annual reminders to claimants. 471 U.S. at 109 n.18. The Court otherwise evaluated the recording scheme, as a regulation of private property rights, under a rational basis test and determined that although individualized notice might be a more rational and desirable means of administering the scheme, Congress was free to choose *a* rational means of accomplishing its objectives. *Id.* at 109-10.

were not used for period of six months where administrative procedures would allow final determination on the merits), *cert. denied*, 109 S.Ct. 223 (1988).

The Supreme Court has recently made clear, however, that the seductively simple reasoning of *Short* may not be broadly applied to erode due process rights.

In *Tulsa Professional Collection Services v. Pope*, the Court distinguished *Short* from a case involving a provision of Oklahoma's probate laws which required that claims "arising upon a contract" be presented to the executor of a decedent's estate within two months of the publication of a notice advising creditors of the commencement of probatge proceedings. ____ U.S. ____, 108 S.Ct. 1340, 1341-42 (1988). A creditor whose claim was barred as untimely under the nonclaim statute challenged the provision, arguing that notice by publicataion did not satisfy the requirements of the Due Process Clause. The Oklahoma Supreme Court upheld the provision on the ground that such nonclaim statutes were self-executing statutes of limitation which did not require actual notice to parties whose property interests could be terminated by the operation of the statute.

The Supreme Court reversed the Oklahoma court, holding that because the Oklahoma nonclaim statute was set into motion by probate proceedings, it could not properly be considered "self-executing." *Id.* at 1345. the Court clarified the distinction it had drawn in *Short* between the self-executing feature of the Indiana statute and a final, judicial determinataion of the mineral owner's rights in a subsequent quiet title action: "Where the legal proceedings themselves trigger the time bar, even if those proceedings do not necessarily resolve the claim on its merits, the time bar lacks the self-executing feature that *Short* indicated

was necessary to remove any due process problem." *Id.* at 1346.

Although the time limit on the creditor's claim in *Pope* could probably not be considered a part of the substantive definition of that property interest, *Pope* indicates that the crucial factor in determining whether due process applies to the termination of a property interest is not whether the condition is labeled substantive or procedural, but the means by which the condition is set into motion. Even if a property interest is subject to a "substantive" condition from its inception, the operation of that condition may still constitute a deprivation of property to which due process attaches if the "condition" is not self-executing.

The self-executing statute at issue in *Short* did not implicate due process concerns precisely because the statute itself clearly delineated various conditions with which a mineral owner had to comply in order to maintain his or her property rights and also specified that failure to comply with those conditions would result in the termination of those interests. *Short*, 454 U.S. at 537. The statutory scheme for ranking property interests under Louisiana law cannot, however, be considered a self-executing condition on property rights. Although parties are charged with notice that their property interests are subject, by virtue of the recording scheme, to superior interests and may be terminated by a superior claimant's foreclosure on the subject property, the nature of the "condition" is necessarily uncertain. Like the nonclaim provision at issue in *Pope*, the code section which provides for the termination of subordinate property interests is triggered by the legal proceedings themselves. Most importantly, the legal proceedings, both in this case and in *Pope*, were not, as in *Morrison*, triggered by the interest holder's

own actions.[18] Thus, although the ranking of property interests pursuant to the recording system is a rule of general application, its operation is not the predictable result of the interest holder's own failure to comply with a specific requirement for the retention of her rights. We therefore cannot conclude that the subordination of a property interest is the sort of legal condition which falls outside the ambit of the Due Process Clause.

Pope also makes clear that a property interest may be "adjudicate the merits" of the asserted property interest: "[I]t is irrelevant that the notice seeks only to advise creditors that they may become parties rather than that they are parties, for if they do not participate in the probate proceedings, the nonclaim statute terminates their property interests." 108 S. Ct. at 1346.

It is therefore immaterial that Davis' mineral lease was not itself the object of the foreclosure.[19] It is enough

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[18] The nature of the condition's uncertainty is therefore different here than in *Morrison*. The court in *Morrison* stated that the fact that the "moment" of foreclosure was undetermined when the parties signed the mortgage "did not nullify the conditional nature of [the] equity of redemption." 747 F.2d at 615. However, as the court pointed out, the uncertainty was ultimately within the interest holder's own control. *Id.*

Because the instant case may be distinguished from *Morrison* on this ground, we need not address further the possible effect of *Pope* on the validity of the Eleventh Circuit's reasoning in *Morrison*.

[19] We note that Louisiana law does not appear to give lessees any specific, statutorily-defined rights with respect to foreclosure proceedings.

In contrast, third parties who have purchased the property "subject to" a mortgage (without assuming the debt) or who have purchased the property and "assumed" the debt have statutorily defined rights with respect to foreclosure proceedings and execution of a foreclosure judgment. *see supra* (summary of Louisiana foreclosure procedure).

It does not appear that a mineral lessee would be considered a

that Davis'property interest, along with the mortgagor's, would be extinguished by the foreclosure.

We therefore hold that the termination of Davis' lease by FNB's foreclosure and the subsequent seizure and sale of the subject property "deprived" Davis of a legally protected property interest within the me aning of the fourteenth amendment.

C. *Constitutionally Adequate Notice*

Having held that the foreclosure was subject to the constraints of the Due Process Clause because Davis was

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(Footnote 19 continued)
third possessor under Louisiana law. *See In re Union Central Life Ins. Co.*, 23 So.2d 63, 71 (La. 1945) (third possessor is someone other than a mere tenant, a trespasser, or one having only physical possession); *Penn v. Citizens' Bank of Louisiana*, 32 La. Ann. 195 (1880). Although a mineral lease is considered to be a "real" right, *see supra* note 13, this designation does not give the mineral lessee greater substantive rights in realty than an ordinary lessee. *Arnold v. Sun Oil Inc.*, 48 So.2d 369 (La. 1951).

Similarly, parties claiming a mortgage or privilege on the property may intervene in a foreclosure by ordinary proceeding in order to ensure that their claims are included in the distribution of proceeds from the sheriff's sale. La. Code Civ. P. art. 1092. It is unclear whether a lessee would be entitled to intervene under this provision. It could therefore be argued that because a lessee's statutory rights with respect to a foreclosure are more limited than those of other interest holders, a lessee's rights are even more conditional. *See Bonner*, 452 F.Supp. at 1299-1300 (relying in part on existence of third possessor's statutory right to arrest proceedings to hold that third possessor whose name and address are known to mortgagee is entitled to notice of seizure in foreclosure by executory process).

However, even if the only benefit that a lessee would gain from receiving notice is the opportunity to bid at the sheriff's sale, that opportunity is not insignificant given that the lessee's property interest would otherwise be terminated altogether by the sale. Accordingly, we do not consider the limited nature of a lessee's rights sufficient grounds to alter our conclusion that Davis was "deprived" of a legally protected property interest within the meaning of the fourteenth amendment.

deprived of a legally protected property interest by action under color of state law, we must now decide whether the requirements of due process were satisfied by advertising the sale of the subject property in a local newspaper.

Invoking the broad language of *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983), Davis maintains that the district court erred in holding that constructive notice was sufficient in this case. In *Mennonite*, the Supreme Court held that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well-versed in commercial practice, if its name and address are reasonably ascertainable." *Id.* at 800. The Court found that constructive notice of an impending tax sale was not sufficient to satisfy due process "[w]hen a mortgagee is identified in a mortgage that is publicly recorded." *Id.* at 798.

Davis asserts that its identity and address were readily ascertainable from the conveyance records of Lafayette Parish and that it was therefore entitled to actual notice of the seizure and sale of the subject property.

The district court, however, found that information regarding Davis' interest in the subject property was not *reasonably* available to FNB as a seizing creditor. The district court held that "[a]bsent knowledge of the existence of a mineral lease, FNB was not constitutionally required to blindly search conveyance records for those interests."[20] The district court noted further that

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[20] Relying on depositions of FNB employees who stated that they were aware that there had been a "blow out" at a well located in land adjacent

although Davis' failure to request notice under Louisiana Revised Statutes 13:3886 did not constitute a waiver of its due process rights, the existence of the request-notice statute should be a factor in determining the overall reasonableness of requiring a creditor to provide actual notice to parties with interests in the subject property. The district court held that RS 13:3886 was curative of any constitutional deficiency in Louisiana's constructive notice provisions only with respect to parties whose interests in the property are *not* otherwise reasonably ascertainable.

We note as an initial matter that the district court was absolutely correct in holding that a failure to request notice under RS 13:3886 does not constitute a waiver of due process rights. Although due process rights may be waived, a waiver of constitutional rights is not effective unless the right is intentionally and knowingly relinquished.[21] *Bueno v. City of Donna*, 714 F.2d 484,

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(Footnote 20 continued)
to the subject tract, Davis maintains that FNB had reason to know of the existence of a mineral lease and should have made appropriate inquiries. Davis does not, however, dispute the district court's finding that FNB did not *actually* know of the existence of a lease. As we explain more fully below, we agree with the district court that absent knowledge of the existence of a lease, FNB was not required to search the conveyance records to identify mineral lessees.

[21] Although the Supreme Court has not held expressly that the standard for waiver of constitutional rights in non-criminal contexts is the same as in the criminal context, it has also declined to expressly adopt a lower standard. *See D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (finding waiver effective even under standard for criminal cases).

The Court *has* found constructive waiver of due process rights. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982) (failure to comply with discovery constituted waiver of challenge based on lack of personal jurisdiction); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (failure to make effort to contest parental termination proceedings constituted waiver of right to appointed counsel). However, these findings of constructive waiver were based upon specific conduct by the complaining party. In contrast, the

498-94 (5th Cir. 1983) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Louisiana may *not* rely upon a legal fiction of implied waiver of due process rights to cure constitutional defects in its constructive notice provisions. To the extent that the district court's holding in *Mid-State Homes Inc. v. Portis*, 652 F.Supp. 640 (W.D. La. 1987), implies that RS 13:3886 would be constitutionally adequate as the sole determinant of parties entitled to notice of the seizure of property, we expressly reject that reasoning. *See also Bankers' Life Co. v. Shost*, 518 So.2d 563, 569 (La. App. Cir. 5 1987) (following *Portis* and holding that second mortgagee who failed to request notice under RS 13:3886 waived any right to object to adequacy of constructive notice).

As the district court correctly held in this case, a seizing creditor who avails itself of state foreclosure procedures is constitutionally obligated to provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Louisiana request-notice statute does not relieve a creditor of this constitutional obligation if the creditor has reasonable means at its disposal to identify those parties whose interests will be adversely affected by the foreclosure.

We also agree with the district court, however, that the existence of RS 13:3886 is not wholly irrelevant to the determination of the reasonableness of constructive notice

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(Footnote 21 continued)
request-notice statute, if construed to be constitutionally adequate standing on its own, would establish a *presumption* that any person failing to request notice had waived his or her due process rights.

To shift in this fashion the burden of compliance with the Due Process Clause almost entirely to the shoulders of individual property owners would eviscerate the protections afforded by the constitution. *See Mennonite*, 462 U.S. at 799.

under particular circumstances.

Although the three justices who dissented in *Mennonite* expressed concern that the majority had abandoned the "reasonableness' inquiry of *Mullane* in favor of a rigid rule that constructive notice is never constitutionally adequate, 462 U.S. at 800-02 (O'Connor, J. dissenting), the Court's subsequent decision in *Pope* makes clear that the flexible principles enunciated in *Mullane* have not been abandoned. Rather, a reviewing court must "balanc[e] the 'interest of the State' and 'the individual interest sought to be protected by the Fourteenth Amendment.' . . . The focus is on the reasonableness of the balance, and, as *Mullane* itself made clear, whether a particular method of notice is reasonaable depends upon the particular circumstances." ___ U.S. at ___, 108 S.Ct. at 1344; *see also Bender v. City of Rochester,* 765 F.2d 7, 10 (2d Cir. 1985) (majority in *Mennonite* made no claim that it was departing from the flexible standard of *Mullane*).

Applying the principles of *Mullane* and *Mennonite,* the district court concluded below that a search of the conveyance records to identify parties with mineral leases on the subject property would be unduly burdensome.

We note that to the extent that the district court opinion characterizes the burden imposed on a seizing creditor as requiring the creditor to identify *viable* mineral leases, the district court may not have framed its inquiry properly. The seizing creditor is not required to determine conclusively which property interests are in fact viable. Rather, the creditor is required only to undertake "reasonably diligent efforts" to identify and provide notice to parties having an interest in the subject property. *Pope,* 108 S.Ct. at 1348 (citing *Mullane,* 462 U.S. at 798 n.4). The proper inquiry is therefore whether reasonable diligence re-

quires that the seizing creditor search the conveyance records for the names and addresses of persons holding mineral leases on the subject land.[22]

Applying this standard, we nevertheless conclude that the record amply supports the district court's finding that a search of the conveyance records to identify parties with mineral interests would be unduly burdensome and "is a task beyond the routine examination of land records that was involved in *Mennonite.*" *See Bender,* 765 F.2d at 11.

In asserting that the district court's conclusion is erroneous as a matter of fact, Davis relies heavily on the deposition of Joan Broussard, an employee of the Lafayette parish Clerk's office. While Ms. Broussard testified that she was able to identify Davis' lease and to make copies of the relevant documents within 24 minutes, the deposition also reveals that in order to identify Davis' lease, Ms. Broussard had to run a separate check to determine that the original lease to Louisiana Land Management had been assigned to Davis. Davis has established at most that it would be fairly easy to identify a single lessee — when the Clerk knows what to look for. This does not answer the question whether "reasonable diligence" would in general require a seizing creditor to search the Parish conveyance records. If a piece of property is subject to multiple leases, or if the interest in a single lease has been

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[22] Similarly, the district court opinion at times frames the relevant standard as whether the name and address of the party is "very easily ascertainable," citing *Schroeder v. City of New York,* 371 U.S. 208, 212-13 (1962). *Mullane* itself generally speaks in terms of "reasonableness" and both *Mennonite* and *Pope* use the language "reasonably ascertainable." *Mennonite,* 462 U.S. at 800; *Pope,* 108 S.Ct. at 1348. Although we find no reversible error on the part of the district court, we apply the standard as it is phrased in the Supreme Court's more recent decisions.

divided and assigned to different entities (as it in fact was in this case), the search for those with an interest in the property would require far more than an initial search of the conveyance records in the name of the owner of the subject property. The creditor would have to trace in turn the conveyance records of each subsequent assignee. Far from being a simple, 24 minute undertaking, a search of the conveyance records for the mineral interests on a single piece of property could resemble a rather large tree with several limbs and innumerable branches. Thus, even if the creditor makes no attempt to determine the actual validity of a particular lease, the process of merely identifying those who *might* have an interest in a mineral lease could itself be extremely cumbersome. We conclude that the district court did not, therefore, overstate the burden to creditors of conducting this type of search.

In evaluating whether it is reasonable, under the circumstances, to require a seizing creditor to undertake a search of the conveyance records, we find the Second Circuit's reasoning in *Bender v. City of Rochesster,* on which the district court also relied, to be persuasive. In *Bender*, the court considered whether due process required that the city search the records of the Surrogate's Court to determine whether the owner of property subject to a tax foreclosure had died and to identify the distributees of the subject property. The court noted that a search of the records of the Surrogate's Court would not necessarily reveal either the identity of the decedent's successors in interest or the nature of their interests. 765 F.2d at 11. On "the other side of the 'reasonableness' inquiry," the court noted that the city should be entitled to expect that the administrator of an estate would take steps to enter the fact of death in the land records or, at a minimum, would make arrangements to receive the decendent's mail in order to keep apprised of developments that could affect the estate.

Id. at 11-12.

The court thus evaluated the burden of conducting a potentially fruitless search, together with the means available to the claimant to protect his asserted interest, and concluded that "[i]n light of all the pertinent circumstances," the names of distributees were not "reasonably assertainable" within the meaning of *Mennonite. Id.* at 12.

In the instant case, we evaluate the burden of requiring a seizing creditor to wend its way through a potentially complex maze of leases and assignments in order to identify interested parties, together with the relatively simply means available, under RS 13:3886, to ensure receipt of notice.[23] We conclude that under the circumstances "reasonable diligence" did not require that FNB search the conveyance records to ascertain the identities of mineral lesses.[24]

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[23] We note that RS 13:3886(D) which provides that "[t]he failure of the sheriff to notify a person requesting notice of seizure shall not affect the rights of the seizing creditor nor invalidate the sheriff's sale" may pose constitutional problems to the extent that RS 13:3886 is not wholly supplementary to the notice that is required by the Due Process Clause. That issue, however, is not properly before us in this case since Davis did not request notice under RS 13:3886.

[24] This holding is not inconsistent with *Bonner* and *Portis* which held, respectively, that a third possessor and a second mortgagee were entitled (with some qualifications in each case) to more than constructive notice of the seizure of property in a foreclosure by executory process. *Bonner,* 452 F.Supp. at 1302; *Portis,* 652 F.Supp. at 645.

Because the reasonableness of requiring a particular method of notice depends on the particular circumstances, *Pope,* 108 S.Ct. at 1344, a reviewing court could easily conclude that the search of property records required to identify a third possessor or second mortgagee is less burdensome than that required to identify parties with mineral interests in the same land.

Davis observes that a seizing creditor would already be required, under *Bonner,* to search the conveyance records to determine whether the subject property had been sold to a third party. First, without ex-

We are aware, as was the Second Circuit, that *Mennonite* states explicitly that "a party's ability to take steps to safeguard its interests does not relieve the State of its constitutional obligation." 462 U.S. at 799. We agree with the Second Circuit, however, that "the initial determination of what obligation due process imposes must take into account what the interested party, or someone obligated to act on its behalf, is likely to do." 765 F.2d at 11.

Specifically, we do not construe *Mennonite* as requiring actual notice to every party who has a publicly recorded interest in the subject property. *But see Verba v. Ohio Casualty Ins., Co.*, 851 F.2d 811, 816 (6th Cir. 1988) (holder of publicly recorded lien entitled to more than constructive notice of tax sale); *Harris v. Gaul*, 572 F.Supp. 1554, 1561 (N.D. Ohio 1983) (holder of property interest that is both "legally protected" and "publicly recorded" must be given actual notice of a pending sale). Given the complexity of land records in some jurisdictions, the "reasonableness" constraint of *Mullane* must limit the broad language of *Mennonite. See Pope*, 108 S.Ct. at 1344. Accordingly, the reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake

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(Footnote 24 continued)
pressing an opinion on the matter, we note that the holding in *Bonner* is more limited than Davis states - the court relied heavily on the fact that the mortgagee in *Bonner knew* the name and address of the third possessor.

Second, and more importantly, as we note above, a search of the conveyance records does not consist of a single search, but would also involve tracing any subsequent transfers made by the persons to whom the original owner had sold or leased a property interest. It is therefore reasonable to draw some line limiting a seizing creditor's obligation to search land and conveyance records.

Our holding today rests upon the particular complexity of identifying mineral interests through a search of Parish conveyance records and should not be construed to undermine the holdings in *Bonner* and *Portis*.

and the relative ease or difficulty of identifying such interest holders from the land records and also on the existence of alternative means of insuring the receipt of notice.

Mills argues vehemently that Davis should not be heard to complain of the foreclosure because parties in the oil and gas industry are well aware that a mineral lease may be extinguished by foreclosure on a superior mortgage. Mills notes that it is common practice to obtain a subordination of a superior mortgage in order to protect a mineral lease from precisely the eventuality complained of here. While Davis' failure to obtain a subordination in no way eliminated Davis' due process rights, this factor does indicate that it is not unreasonable to expect that a party in Davis' position, having elected not to obtain a subordination, would at least take the minimal step of requesting notice under RS 13:3886 — which would have ensured that in the event of a foreclosure Davis would have an opportunity to preserve its interest by bidding at the sheriff's sale.

The act of requesting notice under the statute does not, moreover, impose a burden of constant vigilence on the property owner. Rather, it allows one whose identity as an interest holder may not otherwise be readily ascertainable to protect his or her interest in the subject property through a single, simple act. We therefore do not believe that our limited reliance on RS 13:3886 runs afoul of *Mennonite*.[25]

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[25] The Supreme Court has held that a provision for requesting notice may save a notice procedure that is otherwise constitutionally suspect. In *Lehr v. Robertson*, 463 U.S. 248, 263-64 (1983), the Court upheld against due process challenge a New York statutory scheme for providing notice of pending adoptions to unmarried fathers where the state

We therefore conclude that the district court correctly held that under the circumstances, constructive notice of the seizure and sale of the subject property was sufficient to satisy the reuirements of due process.[26]

III.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

(Footnote 25 continued)
provided for automatic notice to putative fathers who were likely to have assumed responsibility for the child and also created a putative father registry. Because the plaintiff in *Lehr*, who did not fall into any of the seven categories of persons entitled to automatic notice, had failed to avail himself of the request-notice of the pending adoption proceedings. *Id.* at 264-65; *cf. Kickapoo Tribe of Oklahoma v. Rader*, 822 F.2d 1493, 1499-1500 & n.8 (10th Cir. 1987) (noting absence of request-notice provision or other procedural protections in Oklahoma law in holding that efforts to locate father did not satisfy due process).

[26] Our holding makes it unnecessary for us to address the propriety of the remedy sought by Davis.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-4940

FILED
MAY 15 1989

DAVIS OIL COMPANY, ET AL.,
Plaintiffs-Appellants

versus

WILLIAM P. MILLS, III, ET AL.,
Defendants-Appellees.

****

WILLIAM P. MILLS, III, ET AL.,
Plaintiffs-Appellees,

versus

DAVIS OIL COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Louisiana

Before KING, JOHNSON and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal, to be taxed by the Clerk of this Court.

May 15, 1989

ISSUED AS MANDATE:

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87-4940

FILED
JUN 14, 1989

DAVIS OIL COMPANY, ET AL.,
Plaintiffs-Appellants,

versus

WILLIAM P. MILLS, III, ET AL.,
Defendants-Appellees.

****

WILLIAM P. MILLS, III, ET AL.,
Plaintiffs-Appellees,

versus

DAVIS OIL COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

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ON SUGGESTSION FOR REHEARING EN BANC

(Opinion *May 5,* 5 Cir., 1989, ____F.2d____)

(June 14, 1989)

Before KING, JOHNSON and JOLLY, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

/s/ Carolyn Dineen King

United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

FILED
AUG 5 1987

DAVIS OIL COMPANY, ET AL

V. CIVIL ACTION NO. 85-1890 "L"

WILLIAM P. MILLS, III, ET AL JUDGE JOHN M. DUHE, JR.

MEMORANDUM RULING

This action was submitted for trial on briefs and documentary evidence. This ruling outlines findings of fact and conclusions of law drawn from those submissions. Where factual findings have been characterized as legal conclusions and vice-versa, they should be construed according to their true nature.

As outlined below, it is the opinion of this court that the judicial sale contested in this action was constitutionally sound. Moreover, a mineral lease burdening the involved land was extinguished by judicial sale pursuant to a writ of *fieri facias*. Accordingly, plaintiffs' complaint will be dismissed.

FINDINGS OF FACT

Kenneth D. Upton purchased a 14.63 acre tract ("subject tract") of land located in Lafayette Parish, Louisiana in August, 1977. In May, 1983 Upton mortgaged this property as collateral for a $500,000 loan from defendant First National Bank of Lafayette ("FNB"). the collateral mortgage was properly recorded in Lafayette Parish mortgage records. This loan was intended to finance Upton's

business, American Rental Tools, Inc.

In November, 1983, Upton granted a mineral lease of the subject tract to Louisiana Land Management, Inc. The lease was promptly recorded in the Lafayette parish conveyance records. On January 30, 1984, Louisiana Land Management, Inc. assigned the lease to plaintiff Davis Oil Company ("Davis"). This assignment was also promptly recorded.

Upton defaulted on this loan and other obligations to FNB in April, 1984. FNB filed suit against Upton and American Rental Tools, Inc., specifically alleging, *inter alia*, default on the mortgage encumbering the subject tract. Upton confessed judgment and waived all delays. The judgment, reflecting a total debt of $3,500,000, recognized the mortgage affecting the property.

In execution of its judgment, FNB obtained a writ of *fieri facias*, ordering the Lafayette Parish Sheriff to seize property belonging to Upton. FNB targeted certain properties, including the land leased to Davis, for seizure and judicial sale. The seized property also included both movables and immovables in which FNB had no security interest except its judgment. FNB was unaware of Upton's grant of a mineral lease on the subject tract. On May 30, 1984, the Sheriff sold this land to FNB after obtaining a certificate of nonmortgage. A deed reflecting the sale was recorded in June, 1984. No actual notice was afforded Davis, although the judicial sale was advertised in compliance with La. Code Civ. Proc. Ann. art. 2331 (West 1961).

On March 10, 1984, the Davis Oil Company - Bayou Tortue Well No. 2, located on property adjacent to the subject tract, blew out. The well indicated a significant

hydrocarbon discovery. In August, 1984, Davis assigned portions of its interest in the lease to Exxon Corporation, Grace Petroleum Corporation, NWT Natural Resources Company, Saturn Energy Company, Vale & Company, and Allen E. Paulson (references to "Davis" include the assignees). These assignments were recorded by November, 1984.

In September, 1984, Davis gave notice that it planned to apply to the Commissioner of Conservation for the establishment of a production unit for Bayou Tortue Well No. 4, incorporationg the subject tract. Because defendant William P. Mills, III owned nearby property, he was provided with notice of this intent.

On October 31, 1984 Mills and FNB entered into a letter agreement in which FNB agreed to sell the subject tract to Mills. Negotiations continued over the warranty FNB would deliver. In the interim, Mills obtained a title opinion which specifically questioned the validity of the Sheriff's sale.

On February 4, 1985, the Commissioner of Conservation signed an order incorporating a portion of the subject tract into the Bayou Tortue Well No. 4 production unit. This act guaranteed the subject tract a share of the production from the unit. On February 12, 1985, Mills, John L. Robertson, Brenda Sue Harmon Robertson, Orel Bridges, Jr., and Ethel Sue Hoffpauir Bridges (collectively "Mills") purchased the subject tract. The contract stipulated that the sale was subject to recorded leases. The sale was recorded the following day.

On July 1, 1985 Davis filed suit in this court, seeking relief on four counts. Federal jurisdiction is predicated on the presence of a civil rights claim, 28 U.S.C. § 1343(3), and

diversity of citizenship, 28 U.S.C. § 1332. First, Davis contends that the Sheriff's sale of the subject tract was constitutionally flawed, and asks for a declaratory judgment to that effect. Secondly, Davis asks for equitable relief for the enhanced value of the subject tract resulting from a well Davis drilled on adjacent land within the same production unit. Third, Davis seeks a declaratory judgment that its lease could not be extinguished by a judicial sale enforcing FNB's judgment. Finally, Davis asks for a declaratory judgment that the subject tract is burdened by the lease, because Davis' recordation of the lease before First National Bank sold the property to Mills estops Mills from asserting otherwise.

A number of crossclaims involving idemnity questsions were initiated among the defendants. Additionally, Mills counterclaimed and filed a separate damage suit, which was initially consolidated here. Mills' claims have since been separated and continued pending disposition of this action.

CONCLUSIONS OF LAW

1. *The Due Process Claim*

Count 1 of Davis' complaint prays for a declaratory judgment that the Sheriff's sale of the subject tract was constitutionally flawed. Mills advances four alternative arguments in opposition. First, Mills contends that the Sheriff's sale pursuant to a writ of *fieri facias* did not constitute state action. In the alternative, Mills contends that Davis' lease cannot be considered a protected property interest because the judicial sale terminated it by operation of law. Additionally, Mills contends that if due process was required, the constructive notice afforded by publication was sufficient to satisfy constitutional minimums. Finally,

Mills asserts that his good faith purchase of the subject tract insulates him from any remedy under a due process claim.

As detailed below, the contested judicial sale implicates both state action and a protected property interest. Because this court finds constructive notice sufficient to satisfy due process requirements under these facts, the appropriateness of the nullification of the judicial sale as a remedy had not been addressed.

A. *State Action*

Turning first to the state action issue, Mills' reliance on *Earnest v. Lowentritt*, 690 F.2d 1198 (5th Cir. 1982), is misplaced. That case holds that initiation of foreclosure proceedings does not implicate state action when notice was afforded the debtor. *Id.* at 1201-01. The Supreme Court has consistently characterized the private use of legal procedures as attributable to the state when property is seized pursuant to an *ex parte* application. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (state garnishment procedure); *Lugar*, 102 S.Ct. 2744 (state replevin statute). This is precisely Davis' complaint. It alleges that the Louisiana codal scheme is constitutionally flawed in that it provides for seizure of a lessee's property interest without notice. Louisiana's procedural scheme is a product of state action. If constitutionally defective, its invocation by FNB makes the bank a "state actor". *See Jackson v. Galan*, 631 F.Supp. 409, 413 (5th Cir. 1986).

B. *The Leasehold as a Protected Interest*

With regard to the establishment of a property interest accorded due process protections, the Supreme

Court has observed the following:

> Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support certain claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 1701, 1709, 33 L.Ed. 2d 548 (1972). The hallmark of property, the hight court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except "for cause". *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 430, 102 S.Ct. 1148, 1155, 71 L.Ed. 2d 265 (1982). Once that characteristic is found, the types of interests protected as "property" are varied and, as often as not, intangible, relating to the whole domain of social and economic fact. *Id.*

La. Code Civ. Proc. Ann. art. 3664 (West Supp. 1985) reads:

> The owner of a mineral right may assert, protect, and defend his right in the same manner as the ownership or possession of other immovable property, and without the concurrence, joinder, or consent of the owner of the land or mineral rights.

Article 3664 reflects the civil law's recognition of the mineral lease as a source of incorporeal rights. *See Mire v. Sunray Dx Oil Company*, 285 F.Supp. 885, 889-90 (W.D.La. 1968) (lease constitutes a *jus ad rem*, or right exercisable by person over a particular property by virtue of contract). *See also Devines v. Maier*, 665 F.2d 138, 141 (7th Cir. 1981)

(leasehold interests constitute protected property interest). Because Davis' lease constitutes a protected property interest, its termination by operation of law would invoke due process concerns.

C. *The Sufficiency of Constructive Notice*

In *Mullane v. Central Hanover Bank & Trusts Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), the Supreme Court recognized that prior to action affecting a property interest, states must provide "notice reasonaably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afforded them an opportunity to present their objections."

The rule emerging from *Mullane* is that constructive notice is insufficient as to persons actually known to a seizing creditor, or whose identify was "very easily" ascertainable. *Schroeder v. City of New York*, 371 U.S. 208, 212-13, 83 S.Ct. 279, 282, 9 L.Ed. 2d 255 (1962). Davis contends that a routine examination of the land records would have revealed its property interest. Mills asserts that such an inquiry would be unreasonabale. Both the lease to Louisiana Land Management and the subsequent assignment to Davis were properly recorded in the parish conveyance records.

Mills additionally argues that Davis waived any right to notice by failing to invoke the provisions of La. Rev. Stat. Ann. § 13:3886 (West Supp. 1986). R.S. 13:3886 provides a mechanism whereby any person may request notice of the seizure of immovabale property upon payment of a nominal fee. The statute specifically provides that a failure to notify a requesting party will not invalidate a judicial sale.

In a recent case involving a seizure under executory process, this Court held that constructive notice to an inferior creditor was sufficient to satisfy due process requirements. *Mid-State Homes, Inc. v. Eddie Belle Portis, et al.* 652 F. Supp. 640 (W.D. La. 1987) (Stagg, C.J.). In *Mid-State Homes,* an inferior mortgagee was not properly identified in the mortgage records. No request for notification had been made pursuant to R.S. 13:3886. Consequently, no actual notice could be given. When the property was sold at judicial sale, the proceeds were insufficient to satisfy the inferior mortgage. The inferior creditor unsuccessfully challenged the sale on the basis of a due process violation.

Mills contends that *Mid-State Homes* stands for the proposition that a creditor's failure to provoke notice under R.S. 13:3886 implies the sufficiency of constructive notice. Due process rights are waivable, *D.H.M. Overmyer Co. Inc., v. Frick Company,* 405 U.S. 174, 185, 92 S.Ct. 775, 782, 31 L.Ed.2d 124 (1972), but only if intentionally and knowledgably relinquished. *Bueno v. City of Donna,* 714 F.2d 484, 492-93 (5th Cir. 1983). Clearly, Davis' failure to utilize the notice mechanism of § 13:3886 does not constitute an effective waiver of a constitutional right to due process. As emphasized in *Mennonite Board of Missions v. Adams,* 462 U.S. 791, 799, 103 S.Ct. 2706, 2712, 77 L.Ed.2d 180 (1983), a party's ability to protect its interests does not relieve government of due process obligations. To the extent that *Mid-State Homes* purports to hold otherwise, I would respectfully disagree. *See id.*. at n.2 (recognizing issue without resolution).

It is apparent, however, that Mills misreads *Mid-State Homes.* That case is properly understood only to define R.S. 13:3886 as curative of any constitutional deficiency in Louisiana's constructive notice provisions as they relate to unidentifiable creditors. If a seizing creditor has

reasonable means to determine the identity of other protected interests, he cannot avoid actual notification because of those interest's failure to invoke R.S. 13:3886.

The constitutional adequacy of constructive notice is measured in terms of the circumstances of each case. *Mennonite,* 462 U.S. ata 801-02, 103 S.Ct. at 2713 (O'Connor, J., dissenting); *Bonner v. B-W Utilities, Inc.,* 452 F. Supp. 1295, 1303 (W.D. La. 1978). Accordingly, the notice to be afforded Davis is determined by the information *reasonabaly* available to FNB as a seizing creditor. *Cf. In re Nissan Motor Corp. Antitrust Litigation,* 552 F.2d 1088, 1098-99 (5th Cir. 1977).

FNB had no knowledge of Upton's grant of a mineral lease. A search of the parish conveyance records under Upton's name would have revealed a potential interest in Davis. However, the reasonableness of a requirement to search conveyance records is a function of anticipated results, costs, and the interest involved. "A burdensome search through records that may prove not to contain any of the information sought clearly should not be required." *Id.* In this case, FNB had no reason to suspect the existence of a mineral lease. This Court cannot consider constitutional due process requirements to mandate a blind search of conveyance records.

Moreover, the status of a mineral lease cannot be determined from conveyance records. The viability of a mineral leasehold hinges on payment of rents and production history. Reference to records containing this information is clearly beyond the routine examinataion of land records envisioned in *Mennonite. Cf. Bender v. City of Rochester, N.Y.,* 765 F.2d 7, 11 (2nd Cir. 1985) (Surrogate Court record search not required).

Finally, this Court's consideration of the notification obligation due Davis includes actions Davis might have taken to protect its interests. *Id.* Although Davis' failure to provoke notice under R.S. 13:3886 does not constitute a waiver of due process rights, the existence of a notification mechanism effects a determination of the "reasonableness of constructive notice. Because it is not unlikely that a mineral leaseholder would request notice of the judicial sale of the subject tract pursuant to R.S. 13:3886, FNB enjoys a lighter burden in demonstrating the reasonableness of constructive notice. *Id.*

I note that this holding is restricted to the facts presented here. Absent knowledge of the existence of a mineral lease, FNB was not constitutionally required to blindly search conveyance records for those interests. The availability of R.S. 13:3886, and the expectation that an interested party might employ it, contribute to a determination that constructive notice was reasonable. Although a conveyance records search would have accurately apprised FNB of Davis' interest in this case, the ambiguous character of these records does not make a recorded mineral interest "very easily" ascertainable as defined in *Schroeder,* 371 U.S. at 212-13, 83 S.Ct. at 282. Accordingly, due process concepts did not require actual notification of Davis prior to judicial sale of the subject tract.

2. *Equitable Relief*

Count 2 of Davis' complaint prays for equitable relief against defendant Mills. The basis for this claim is an alleged enhancement of the subject tract caused by Davis' drilling activity on adjacent land.

Equity only acts in the absence of positive law. *E.g., Terrebonne Parish Police Jury v. Kelly,* 428 So.2d 1092,

1094 (La. Ct. App. 1933). Louisiana law authorizes the Commissioner of Conservation to establish production units. La. Rev. Stat. Ann. § 30:5 (West Supp. 1987) such a unit, incorporating the subject tract, was established in December, 1984. Section 30:5(c)(3) provides for allocation of production and drilling costs and the costs of capital investment among the unit owners. This statute provides plaintiffs' sole recovery for enhancement of the subject tract.

3. *The Effect of Execution of a Writ of Fieri Facias*

In Count III of the complaint, Davis asks for declaratory judgment that the lease of the subject tract was not extinguished by a judicial sale pursuant to a writ of *fieri facias*. Louisiana law provides creditors with the option of enforcing a collateral mortgage through either ordinary or executory process. La. Code Civ. Proc. Ann. art. 3721 (West 1961). If a mortgage is enforced through ordinary proceeding, the mortgagee must first obtain a judgment against the mortgagor. La. Code civ. Proc. Ann. art. 3722 (West 1961). That judgment is executable under a writ of *fieri facias. Guaranty Bank of Mamou v. Community Rice Mill*, 502 So.2d 1067, 1069 (La. Ct. App. 1976). the adjudicatee at a judicial sale conducted pursuant to a writ of *fiere facias* takes property subject only to any real charges superior to the privilege under which the property was seized. La. Code Cifv. Proc. art. 2372 (West 1961). *See also* Casteix, *Miscellaneous Problem Areas, Louisiana Procedure Symposium*, 22 Loy. L. Rev. 245, 258 (1976). Mills asserts that these principles entitle FNB's judgment to the benefit of the ranking of the collateral mortgage.

The dispositive issue becomes a characterization of FNB's judgment as either a foreclosure *via ordinaria* or an *in personam* judgment. If the judgment is the "privilege"

under which the property was seized, Davis' lease survives. However, because FNB's mortgage predated the lease, a foreclosure based upon it would extinguish the lease. *See T.D. Bickam Corporation v. Hebert*, 432 So.2d 228, 230 (La. 1983).

The judgment executed by FNB recognizes the collateral mortgage on the subject tract. Mills cites case law to demonstrate that a collateral mortgage survives a judgment recognizing it. *Lalanne v. Payne*, 7 So. 481 (La. 1890). I agree with this proposition. However, such a mortgage must be enforced via a foreclosure to retian its ranking relative to after-initiated leases. This distinction is not entirely arbitrary. Davis' failure to negotiate a subordination of the mortgage to is lease exposed it to the risk of foreclosure on the mortgage. However, it did not make its interest susceptible to an *in personam* judgment entered after the lease was effective. Recognition of the collateral mortgage cannot alone support a characterization of FNB's judgment as a foreclosure.

R & R Land Company v. Lawson, 427 So.2d 1356, 1358 (La. Ct. App. 1983) suggests an analysis of the pleadings supporting FNB's judgment as a means of determining the relative ranking of the judgment and the lease. FNB's petition alleged both the existence of the mortgage and its default. The record includes a supporting affidavit to that effect. Upton's answer admits all allegations. These circumstances support divestiture of Upton's title by foreclosure. *See Chateau Lafayette Apartments, Inc. v. Meadow Brook National Bank*, 416 F.2d 301, 304 (5th Cir. 1969). Accordingly, the consent judgment entered into by FNB and Upton is properly considered a foreclosure *via ordinaria*. Because the judicial sale was predicated on a foreclosure, Davis' lease, subsequent in time to the mortgage, was extinguished. The inclusion of

nonrelated debt in the same judgment cannot alter the nature of FNB's seizure of the subject tract.

4. *The Estoppel Claim*

Davis seeks a declaratory judgment that the subject tract is burdened by the lease. The basis for this judgment is that the lease was recorded, and a provision in the contract of sale subjects the sale to prior recorded leases. Davis contends that Mills is now estopped from contesting the validity of the lease.

Mills argues that estoppel is inappropriate in the absence of either detrimental reliance on the part of Davis and its assignees or privity between the contracting parties and the Davis group. I agree.

The Public Records Doctrine, annunicated in *McDuffie v. Walker,* 125 La. 152, 51 So. 100 (1909), acts to prevent claimants from asserting unrecorded interests against subsequent purchasers. However, the doctrine does not purport to validate recorded interests of its own accord. Absent some other basis for estoppel, Mills is free to attack claims on his predecessor's title, even if holders of unrecorded interests could not press them against Mills.

Louisiana law recognizes estoppel in three circumstances: by record, by deed, and "*in pais*". *Humble Oil & Refining Company v. Baudoin,* 154 So.2d 239 (La. Ct. App. 1963). Estoppel by record, or judicial estoppel, is inapplicable here. It is only raised by a reliance on judicial pleadings. *Stevens v. New Orleans and Northeastern Railroad Co.,* 341 F.Supp. 497 (E.D. La. 1972).

Estoppel by deed acts to bind parties to the material terms of the instrument. *Eves v. Morgan City Fund,* 252

So.2d 770, 775 (La. Ct. App. 1971). However, it is well settled that estoppel by deed is only operative between parties to the deed and their privies. Strangers to the deed cannot invoke the estoppel. *Taylor v. Turner,* 45 So.2d 107, 110 (La. Ct. App. 1950. Clearly, Davis has no relationship with FNB or Mills which would support a claim of estoppel by deed.

Estoppel "*in pais*" or equitable estoppel, is defined as the effect of a party's voluntary conduct which induces justifiable reliance to another's detriment. *Babin v. Montegut,* 271 So.2d 642, 645 (La. Ct. App. 1973). The requirement of detrimental reliance is common to both estoppel by deed and equitable estoppel. To prevail on an estoppel argument, Davis must demonstrate that it was aware of Mills' acquiensence to FNB's insistence that the sale be subject to recorded leases, and that it reasonably relied on this act to its detriment.

Davis has failed to support allegations of detrimental reliance on Mills' actions. Davis had acquired the leasehold and assigned various interests by August, 1984. Mills did not enter into a letter agreement with FNB until October, 1984 and did not accede to FNB until October, 1984 and did not accede to FNB's terms until February, 1985. Although Davis reacquired some portion of the interest it assigned, there is no indication that it reasonabaly relied on Mills acquiescence to the contract terms in doing so. Accordingly, Mills must prevail on this claim.

THE CROSS CLAIMS

Outstanding cross claims include reciprocal actions filed by FNB and Mills for indemnity against liability on Davis' equitable enhanced value claim. Because Davis' enhanced value claim will be dismissed, these cross claims are moot.

FNB has also filed a cross claim against Upton for indemnity for any liability stemming from this action. Disposition of Davis' claims will not involve a judgment against FNB. Accordingly, FNB's cross claim is moot.

/s/ John M. Duke, Jr.
JUDGE, U. S. DISTRICT COURT

COPY SENT:
DATE 8-5-8
BY J.P.
TO: Guste
David
Duplantier
Heinen

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
AUG 5 1987

DAVIS OIL COMPANY, ET AL

V. CIVIL ACTION NO. 85-1890 "L"

WILLIAM P. MILLS, III, ET AL JUDGE JOHN M. DUHE, JR.

J U D G M E N T

For the written reasons assigned in the Memorandum Ruling of this date:

IT IS ORDERED that all claims of plaintiffs Davis Oil Company, Exxon Corporation, Saturn Energy Company, Vale & Company, and Allen E. Paulson be DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that the cross claims of defendant The First National Bank of Lafayette be DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the cross claim of defendant William P. Mills, III be DISMISSED AS MOOT.

Lafayette, Louisiana, August 4, 1987.

Judgment Entered 8-6-87
By Illegible
Copy To Rush
Lapeyre/Randazzo
ME Courtright/Ellis
Minyard/Love
Heinen
Duplantier
David
Guste/Kimmel

/s/ John M. Duke, Jr.
JUDGE, U. S. DISTRICT COURT

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 19 1987

DAVIS OIL COMPANY, ET AL

VS. CIVIL ACTION NO. 85-1890 "L"

WILLIAM P. MILLS, III, ET AL JUDGE JOHN M. DUHE, JR.

O R D E R

IT IS ORDERED that the Motion to Amend and Supplement Findings of Fact and Conclusions of Law and Motion for New Trial by Davis Oil Company are DENIED.

Lafayette, Louisiana, November 18, 1987.

/s/ John M. Duke, Jr.
JUDGE, U. S. DISTRICT COURT

COPY SENT
DATE 11-19-87
BY ps
TO: Rush
Lapeyre/Randazzo
Courtright/Ellis
Minyard/Love
Heinen
Duplantier
David
Suste/Kimmel/Midboe